

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **FOR THE SOUTHERN DISTRICT OF TEXAS**  
                  **VICTORIA DIVISION**

3 THE STATE OF TEXAS, ET AL                    )  
  )  
4           Plaintiffs,                            )  
  )  
5 VS.    )  
  )  
6 UNITED STATES DEPARTMENT OF                )  
  HOMELAND SECURITY, ET AL                    )  
7    )  
                  Defendants                       )  
8    )  
9           AND                                    )  
  )  
10          VALERIE LAVEUS, ET AL                )  
  )  
11                   Intervenor-Defendants        )

NO. 6:23-cv-007

Victoria, Texas  
1:26 p.m.

August 23, 2023

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13                   **FINAL PRETRIAL CONFERENCE**

14                   **BEFORE THE HONORABLE DREW B. TIPTON**

15                   **UNITED STATES DISTRICT JUDGE**

16                   **VOLUME 1 OF 1**

17 \*\*\*\*\*

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1 P R O C E E D I N G S

2 COURT SECURITY OFFICER: All rise.

3 THE COURT: Please be seated.

4 All right. We all set? Kellie, you

01:26:32 5 calling it?

6 THE LAW CLERK: Court calls Civil Action  
7 6:23-cv-00007, *State of Texas, et al., v. U.S. Department*  
8 *of Homeland Security, et al.*

9 May we have appearances by counsel?

01:26:42 10 MR. WALTERS: Your Honor, Ryan Walters for the  
11 plaintiff states.

12 Here, my colleagues, Gene Hamilton, James  
13 Rogers, David Bryant, and Luis Suarez.

14 MS. FUDIM: Your Honor, Elissa Fudim for the  
01:26:57 15 federal defendants, and with me Brian Ward.

16 MS. BENTROTT: Your Honor, Jane Bentrrott for  
17 intervenor defendants.

18 With me are my colleagues Vanessa Rivas,  
19 Lauren Wilfong, Esther Sung, Karen Tumlin, and Monika  
01:27:10 20 Langarica. And one of our intervenor defendant clients is  
21 here as well, Eric Sype.

22 THE COURT: All right.

23 Okay. Are we all announced ready and to  
24 proceed tomorrow, from the States and DOJ and intervenors?

01:27:24 25 MR. WALTERS: Yes.

1 MS. FUDIM: Yes, Your Honor.

2 THE COURT: Okay. Then today is kind of a  
3 housekeeping day to set the parameters of how we will  
4 proceed tomorrow. I would like to premark and preadmit as  
01:27:36 5 much unobjected-to evidence and, if possible, rule on the  
6 objections for all of the exhibits, so that everybody  
7 knows, to the extent possible, how to prepare for tomorrow.

8 So I will start with the Plaintiff States'  
9 witness -- I'm sorry, exhibit list. Let me get everybody a  
01:28:00 10 chance to pull that up.

11 Before we get into the weeds of that, is  
12 there anything that we need to take up preliminarily, or  
13 are we ready to move to the exhibits?

14 MS. BENTROTT: Your Honor, we did just have one  
01:28:18 15 question.

16 THE COURT: Sure.

17 MS. BENTROTT: I don't know if we expect the  
18 trial to spill over into Friday, and we just wanted to make  
19 sure we know when to submit our demonstratives.

01:28:27 20 THE COURT: Yes. Okay. So it -- that is going  
21 to be up to the parties. We are available on Friday. My  
22 understanding is, is that we have the one witness; we have  
23 opening statements from the intervenors; is that correct?

24 MS. BENTROTT: Yes, Your Honor.

01:28:41 25 THE COURT: And do the plaintiffs or the DOJ

1 anticipate having an opening statement?

2 MS. FUDIM: No, Your Honor.

3 MR. WALTERS: No, Your Honor.

4 THE COURT: Okay. So then the intervenors will

01:28:49 5 have their opening statement. We will go straight into the

6 evidence, which should be fairly quick. And then we would

7 go to the intervenors.

8 You have one witness; is that correct?

9 MS. BENTROTT: Yes, Your Honor.

01:28:58 10 THE COURT: All right. And then we will go

11 straight into close. That sounds like a pretty quick day,

12 at least for the first part. And then I want to let the

13 parties have as long as they need to do the argument

14 section.

01:29:11 15 So at that point, it is really going to be

16 up to how much time the parties take. We are available to

17 go into Friday, but if you anticipate on using a

18 demonstrative tomorrow, then I would do the swap tonight,

19 because there is a possibility that we would close the

01:29:27 20 entire case tomorrow.

21 Does that answer your question?

22 MS. BENTROTT: That sounds good. Thank you,

23 Your Honor.

24 THE COURT: Okay.

01:29:36 25 MS. BENTROTT: And if you don't mind, we would

1 just like to -- I understand that the Court decided to take  
2 the motion to dismiss of intervenor defendants under  
3 submission, and we would just like to make sure we state  
4 for the record that it is our position that should be  
5 decided and argued today.

01:29:50

6 THE COURT: Right. So I am going to carry the  
7 motion. And the reason why -- so it deals primarily with  
8 standing. And I know that there is an argument made that  
9 we shouldn't have the trial without that.

01:30:01

10 Typically, standing issues are raised as a  
11 legal basis to deny a motion for preliminary injunction.  
12 The motion for preliminary injunction has been carried in  
13 this case to the trial. And so since that is pending, I  
14 think that it makes sense to deal with that in conjunction  
15 with the trial since it is already set.

01:30:18

16 The other reason is, quite frankly, it is  
17 going to be helpful to hear the arguments from counsel on  
18 that and for me to be able to ask questions and get your  
19 responses to those questions. We know that standing is  
20 something that the Supreme Court has been focusing on very  
21 closely. And so, quite frankly, I would like the benefit  
22 from what you have to say, as opposed to just dealing with  
23 it on the briefs. So...

01:30:32

24 MS. BENTROTT: Thank you, Your Honor.

01:30:44

25 THE COURT: All right. From the plaintiffs'

1 exhibits lists what all exhibits are being offered?

2 MR. WALTERS: Your Honor, there are a couple of  
3 exhibits that we have decided to pull. Exhibit 1 and  
4 exhibit -- Luis, do you remember --

01:31:08 5 THE COURT: I tell you what. Why don't you  
6 tell me the exhibits that you are offering at this point.

7 MR. WALTERS: Your Honor, we are offering all  
8 of the exhibits. And there is going to be an additional  
9 one that we are adding that DOJ is pulling from their

01:31:23 10 exhibits.

11 THE COURT: Well, I just thought you said that  
12 you are not offering Exhibit 1.

13 MR. WALTERS: That is right, Your Honor. There  
14 are two -- two that were on our list that we had -- that we  
01:31:32 15 decided to pull; so number 1 and 18.

16 THE COURT: All right. So you're offering 2  
17 through 17 and --

18 MR. WALTERS: 2 through 17 and 19 through 40.

19 And then we are going to add a 41, which  
01:31:47 20 is the federal defendants current -- I think that's Exhibit  
21 H.

22 THE COURT: All right. So I have got -- all  
23 right. So plaintiff is offering, at this time, Exhibits 2  
24 through 17 and 19 through 41, although I haven't seen 41;  
01:32:22 25 and we are about to get that.



1 MR. WALTERS: Yes.

2 THE COURT: Do the federal defendants have  
3 objections to any of those exhibits?

4 MS. FUDIM: Yes, Your Honor. We object to all  
01:32:30 5 of them with the exception of 38, 39, 40, and the  
6 additional 41 that plaintiffs are proposing. We haven't  
7 seen what they propose as the additional 41. We have  
8 discussed it. So I believe that we consent to it, but  
9 obviously we would want to put eyes on --

01:32:47 10 THE COURT: To 41? Okay.

11 MS. FUDIM: Yeah. I understand it to be  
12 certain supplemental data that was contained within  
13 additional production that we made recently. And I don't  
14 know if they intend to use all of it or some of it, so we  
01:32:59 15 would obviously want some clarification as to what the  
16 exhibit consists of; but I don't anticipate an objection  
17 with respect to 41.

18 With respect to the rest, there are both  
19 individual objections, as well as some that are subsumed  
01:33:11 20 within our larger first motion to exclude, based on being  
21 outside the record. So I can address them either with  
22 respect to what I'll refer to as the motion in limine or  
23 individually for bases set forth on the joint pretrial.

24 THE COURT: All right. So what do you think  
01:33:31 25 then -- if you got them by categories, what do you think is

1 the most efficient way to go through the objections? We  
2 can go through them one at a time; it's fine. I want to  
3 make sure I get to the intervenors too. So...

01:33:43 4 MS. FUDIM: No. I think that's probably less  
5 efficient. I think I can address them in groups. Perhaps  
6 I can address first the motion in limine and then also  
7 speak to -- speak to the exhibits, some of the relevance  
8 objections, as a group. That's probably a time-saver --

9 THE COURT: All right.

01:33:58 10 MS. FUDIM: -- if it meets with the Court's  
11 acceptance.

12 THE COURT: That works for me.

13 So why don't we identify them by group so  
14 we can get the numbers, so we know what you're talking  
01:34:07 15 about. So...

16 MS. FUDIM: Well, with respect to our motion in  
17 limine to exclude extra record data --

18 THE COURT: Is that Docket 213? Is that what  
19 that is? That is called Defendants' Motion to Exclude  
01:34:20 20 Evidence.

21 MS. FUDIM: Yes. That's -- yes.

22 THE COURT: All right.

23 MS. FUDIM: With respect to that, we are  
24 objecting to all of the -- all of the documents up to --  
01:34:35 25 through 37, for being extra record documents. And our

1 position is, as we have previously advocated before the  
2 Court, that under *Florida Power & Light*, an APA case should  
3 be based upon the administrative record assembled by the  
4 government.

01:34:52 5                   These documents do not fall within that  
6 category, and we object broadly on that basis.

7                   And if I may, I would like to address some  
8 of the arguments --

9                   THE COURT: Sure.

01:35:01 10                  MS. FUDIM: -- the plaintiff has put forth in  
11 response to the motion that we filed.

12                  Plaintiff has listed and expounded upon  
13 the law of a number of exceptions to the general record  
14 rule doctrine. But plaintiffs have not explained why those  
01:35:15 15 exceptions apply in this case or why those exceptions --  
16 excuse me -- apply to specific documents. And, in fact,  
17 they do not.

18                  So I would first like to start with the  
19 proposition that that is an obligation that they should  
01:35:28 20 have, that it's not enough to simply say these are  
21 exceptions and now apply them without saying why the  
22 exhibits fall within the ambit of those exceptions.

23                  I would refer the Court to two cases.  
24 They are both district court cases, but they are recent  
01:35:47 25 Texas court cases. One is an Eastern District Texas case

1 from July of 2019, and it is *Knight* -- K-N-I-G-H-T -- v.  
2 *U.S. Army Corps of Engineers*. A Westlaw citation, just for  
3 the record, is 2019 Westlaw 3413423. And in that case, the  
4 Court noted that: "Supplementation may be warranted to aid  
5 in the Court's comprehension, but the plaintiff must  
6 establish why supplementation is specifically needed in the  
7 case at issue."

01:36:14

8 In another case called *Reaves v. U.S.*  
9 *Small Business Administration* -- the Westlaw cite is 2020  
10 Westlaw 3976984 -- that's a Northern District of Texas case  
11 from July of 2020 -- the Court reiterated the same general  
12 concept when it noted: "For each category of evidence,  
13 plaintiff fails to articulate how the specific evidence  
14 falls within an exception permitting supplementation of the  
15 administrative record."

01:36:29

01:36:52

16 So as a first-line notion, it is our  
17 position that in order to have the Court apply an exception  
18 to the record rule, plaintiffs need to not just say that  
19 these exceptions exist in the atmosphere, but must tether  
20 them to the exhibits that they claim fall within that  
21 exception. And that is something that they haven't done.  
22 And respectfully, it is our position that it is something  
23 that they can't do.

01:37:06

24 For example, they say that extra-record  
25 evidence may be relevant to a balancing of the equities.

01:37:18

1                   Okay. Sure. But which of these proffered  
2 exhibits are relevant to a balancing of the equities?

3                   Our position would be that none of them  
4 are relevant to a balance of -- balancing of the equities.

01:37:35 5 And to the extent that the Court wants to consider the  
6 actual application of these policies, the effects of these  
7 policies in realtime, to get to a point where it can  
8 balance equities, the out-of-record evidence, so to speak,  
9 to which the Court might look for that purpose is the

01:37:53 10 actual data concerning how these policies were, in fact,  
11 implemented, how many grants were given, who the people  
12 are, where they're going, for example. And that is data  
13 which the parties have submitted as proposed exhibits.

14                   With respect to -- they talk about an  
01:38:14 15 exception for negligence in assembling the administrative  
16 record. Yes, there is an exception for if documents were  
17 negligently excluded from the administrative record. But  
18 again, that is not the case here, which is clear from the  
19 fact that all of the proposed extra-record exhibits that  
01:38:33 20 plaintiffs proffer were created well after the

21 implementation of these policies. So they obviously were  
22 not documents that were considered by the agencies, and  
23 through negligence or otherwise, failed to be included  
24 within the record.

01:38:47 25                   They note that there is an exception for

1 background documents in particularly complex cases to aid  
2 the Court. Again, yes, that is true, but that exception is  
3 applied almost unilaterally in NEPA cases, because the  
4 statutory provision in NEPA requires that agencies consider  
01:39:03 5 certain evidence. And in order to determine if all  
6 environmental factors were considered, the Court has to  
7 have an understanding of what other environmental factors  
8 exist. So those cases come up almost exclusively in that  
9 context.

01:39:18 10                   There, again, is -- plaintiff notes that  
11 there is an exception for the effects of policies as  
12 relevant to whether notice and comment is required, if  
13 policies were actually applied in a mandatory manner, as  
14 opposed to in a discretionary manner.

01:39:40 15                   And again, we would say, okay, there may  
16 be an exception, but we haven't heard why these exhibits,  
17 which include sample forms, training on computer programs  
18 for the use and administration of these programs, muster  
19 reports, which are basically summaries of the policies  
01:39:59 20 themselves, how any of those fall within the notice and  
21 comment exceptions. Plaintiffs have never note- --  
22 identified -- excuse me -- mandatory language in the  
23 challenge processes that is inconsistent with the  
24 discretionary language in the policies such as this Court  
01:40:18 25 found was presi- -- present -- excuse me -- in *Texas v.*

1 *United States* and ICE Priorities.

2                   And, again, if we want to look at whether  
3 or not the policies were applied in a binding manner, the  
4 source data would be the actual data: how many people  
01:40:36 5 applied; how many people showed up with advance travel  
6 authorization at airports and were subsequently denied  
7 entry. I mean, there is actual data to look at.

8                   There is also -- I would note that for the  
9 most part, with the exception of, I believe, Exhibits 30,  
01:40:58 10 31, and 32, which we have separate relevance objections for  
11 which I will get to in a moment, none of these exhibits  
12 that plaintiff is seeking to proffer, these extra-record  
13 offered exhibits, are cited by plaintiffs in their proposed  
14 findings of fact or conclusions of law; and none of them,  
01:41:15 15 even including the three I just mentioned, have been  
16 discussed by any of their declarants for whom they seek to  
17 submit declarations, which, of course, raises certain  
18 questions as to the relevance of documents.

19                   Particular -- both -- particular to the  
01:41:33 20 exceptions to the record rule and then separate as a 402  
21 objection, which I'll get to in a moment, it certainly  
22 raises questions as to how these exhibits would be tethered  
23 to the specific exceptions to the record rule when they  
24 have not offered that in response to the motions in limine,  
01:41:50 25 they are not cited in any proposed findings of fact or

1 conclusions of law.

2 Finally, there's the ultra vires claim  
3 that we had previously briefed both in response at the time  
4 that we were moving with respect to discovery and, again,  
01:42:04 5 in our -- what I am referring to colloquially as the  
6 motions in limine, the motion to exclude at 213.

7 Plaintiffs have argued that they have a  
8 motion in limine claim -- excuse me -- a ultra vires claim  
9 at equity, and that is something that we continue to  
01:42:23 10 dispute. They rely primarily upon the *Larson* case, from --  
11 I believe that's 1949, for the proposition that a party can  
12 seek injunctive relief via an at-equity cause of action.  
13 But it is our position now, as it has been all along, that  
14 that has largely been subsumed by the passing of the APA.

01:42:48 15 With respect to *Larson*, there is a couple  
16 points as to its inapplicability that I would like to make  
17 here. The one is the one I just alluded to, which is that  
18 it does not apply when there is a preemption by a specific  
19 narrow waiver of sovereign immunity like the APA.

01:43:02 20 THE COURT: Has there been an ultra vires claim  
21 that postdates the APA, that you're aware of, against an  
22 agency?

23 MS. FUDIM: I can't speak to whether there has  
24 ever been one filed against any -- presumably, I would  
01:43:16 25 imagine somewhere -- somewhere across the United States,



1 someone has made such -- has filed such claims. But, I  
2 mean, we have cited to cases where that appears to not be  
3 the preferred course.

4                   For example, in *Geyen v. March* (sic),  
01:43:32 5 which was a -- *Marsh* -- excuse me -- a Fifth Circuit case  
6 we cited from 1985, the Court said: "The principal purpose  
7 of this amendment" -- referring to the APA -- "was to do  
8 away with the ultra vires doctrine and other fictions  
9 surrounding sovereign immunity."

01:43:49 10                   In response to that, I know the plaintiffs  
11 have cited to a case called *Leal v. Azar*, where plaintiffs  
12 were permitted to pursue an at-equity claim. But if you  
13 look at *Leal*, the reason the Court permitted the plaintiffs  
14 to sue federal officials for injunctive relief under *Larson*  
01:44:08 15 was precisely because they were not suing under the APA,  
16 and defendants did not challenge the applicability of the  
17 equitable claim.

18                   And in that case, the Court noted that  
19 although it's somewhat of an open question whether the 1976  
01:44:27 20 amendments to the APA abrogated the *Larson* doctrine in  
21 suits against federal agency officials, most challenges to  
22 federal agency action are now brought via the APA, so there  
23 has been little need to litigate the margins of the *Larson*  
24 doctrine.

01:44:41 25                   Defendants do not challenge plaintiffs'

1 invocation of this equitable cause of action, so the Court  
2 assumes the *Larson* doctrine applies.

3                   The Court separately noted plaintiffs are  
4 not bringing any APA claim here, nor are they challenging a  
5 final agency action.

01:44:54

6                   So in that case, the fact that there was  
7 no APA claim, there was no challenge to final agency  
8 action, and the fact that defendants did not argue against  
9 the application of *Larson* is what allowed the Court or  
10 persuaded the Court to permit the ultra vires claim to  
11 succeed.

01:45:12

12                   And in *Armstrong*, which is one of the  
13 cases that plaintiffs cited as well, even Justice Scalia  
14 noted that a Court at equity still has to be confined by  
15 the statutory scheme. And we cited in our proposed  
16 findings of fact and conclusions of law one case referred  
17 to as *Block* the under -- the other -- excuse me -- is  
18 *Thunder Basin* that stands for the proposition that when  
19 Congress creates a particular claim-channeling scheme, it  
20 is strong evidence that it intended to exclude claims  
21 outside of that particular avenue.

01:45:27

01:45:43

22                   THE COURT: What about for standing -- what  
23 about for standing and remedy?

24                   MS. FUDIM: With respect to what, Your Honor?

01:45:57

25                   THE COURT: Admission of extra-record evidence.

1 MS. FUDIM: Yes. There is no dispute that  
2 there could be extra-record evidence as to standing and  
3 remedy. I believe the remedy piece I spoke to a little bit  
4 when I was referring to the balancing of the equities.

01:46:12 5 With respect to standing, again, there is  
6 no dispute by the defendants that the Court can look to  
7 extra-record evidence. But, again, the extra-record  
8 evidence that plaintiff is pointing to I think facially  
9 makes clear that it is not relevant to standing. And then  
01:46:24 10 we are looking at press releases; we're looking at muster  
11 reports; we're looking at sample blank forms. It's not  
12 clear to me how any of that information would go to  
13 standing.

14 I mean, certainly data in terms of numbers  
01:46:40 15 of how the processes have been applied would go to  
16 standing, and that objection is not being carried by me  
17 now.

18 I would like to make one additional point  
19 with respect to *Larson*, if I may. I also wanted to refer  
01:46:52 20 the Court to an Eleventh Circuit decision from July 19th of  
21 2023; so fairly recent. It was a case called *Watkins v.*  
22 *Willis*. For the record, it's 2023 Westlaw 4614497.

23 And I think it's a separate reason why  
24 *Larson* doesn't apply here. The Court wrote: "The Supreme  
01:47:13 25 Court has recognized that a plaintiff may be able to obtain

1 injunctive relief against an individual officer or agent of  
2 the United States in his official capacity for acts beyond  
3 his statutory or constitutional authority because such  
4 actions are considered individual and not sovereign  
5 actions" -- citing to *Larson*.

01:47:31

6 "If, however, a suit, which is nominally  
7 directed against an individual officer, is in substance a  
8 suit against the government, sovereign immunity applies."

9 I think here, although individuals were

01:47:48

10 named in the caption of this case, the sum and substance of  
11 this lawsuit is a claim against the federal government as  
12 the sovereign. And, in fact, when you look at plaintiffs'  
13 ultra vires claim as phrased in the amended complaint,  
14 which is the operative pleading, it's basically word for  
15 word the same as the APA claim.

01:48:06

16 So it's -- their ultra vires claim is the  
17 defendants' parole program exceeds their statutory parole  
18 authority under 8 U.S.C. 1182(d) (5). And that duplicates  
19 their APA claim, where they wrote that their APA claim is  
20 that a defendants' parole program should be held unlawful  
21 under the APA because the program exceeds the defendants'  
22 statutory parole authority under 8 U.S.C. 1182(d) (5).

01:48:25

23 As the Court obviously knows, Section  
24 706(2) (c) of the APA already allows suits for federal  
25 agency action in excess of statutory agency action --

01:48:43

1 excuse me -- in excess of statutory authority.

2                   So it is our position, as it has been from  
3 the outset, that there is no claim here -- proper claim  
4 here for ultra vires conduct. And, I mean, if there were,  
01:49:02 5 one could imagine that in every APA suit, a plaintiff would  
6 have an incentive to reword their claim, and apparently can  
7 do so in almost verbatim, as an ultra vires claim if that  
8 allowed a party to avoid the record rule of the APA, and  
9 submit to the Court extra-record evidence.

01:49:23 10                   So based on all of this, our position is  
11 that the extra-record exhibits that plaintiff has proffered  
12 should not be admitted under any of these exceptions to the  
13 record rule, because they haven't shown, either exhibit by  
14 exhibit or even category by category, how they apply in  
01:49:44 15 this case.

16                   In addition, and sort of shifting focus a  
17 little bit, we did object to certain exhibits based on 402  
18 relevance. And, again, you know, it -- in a case where the  
19 plaintiff was planning to call witnesses to testify, we  
01:50:09 20 would not argue those objections here. We would note them  
21 to preserve them and reiterate them at the appropriate time  
22 if the proper foundation were not laid or if the document  
23 didn't appear to have relevance at that time. But as  
24 plaintiff have no witnesses that they plan to put on the  
01:50:27 25 stand, it's not clear to us what foundation could possibly

1 be provided tomorrow that we couldn't discuss today.

2                   And so with many of these documents, our  
3 position is that they are not relevant. There is no  
4 foundation laid for them. The declarations that they seek  
01:50:45 5 to admit in lieu of testimony don't refer to these  
6 documents. And with the exception of three, which are not  
7 relevant because they don't even have to do with this case,  
8 none of them are even cited in the proposed findings of  
9 fact or conclusions of law.

01:50:58 10                   So we would, in addition, stand on our  
11 relevance objections as noted --

12                   THE COURT: Which exhibits are those? You have  
13 got 2 through 37 for outside the record, and then what  
14 else?

01:51:06 15                   MS. FUDIM: Yes. So we made --

16                   THE COURT: I mean, I have got your motion  
17 here. I'm just trying to make it clear for the record.

18                   MS. FUDIM: Yeah. We have indicated 402  
19 objections for -- well, they withdrew Exhibit 18. So we  
01:51:21 20 have a 402 noted in our objections to plaintiffs' exhibits  
21 for Exhibits 19 all the way down to 37, we indicated Rule  
22 402 -- with the exception of 29. There is no objection to  
23 Exhibit 29.

24                   And let me -- I should correct the record.  
01:51:36 25 I believe earlier I said there was no objection to Exhibits

1 38, 39, 40, and the newly proffered 41. I stand corrected.  
2 Exhibit 29, there is also no objection to. I missed that  
3 one, and I apologize.

01:51:50 4 THE COURT: All right. So 2 through 37 as  
5 outside the record; 19 through 28, objection is relevance;  
6 and then 30 through what?

7 MS. FUDIM: Well, I would correct one thing,  
8 when you said the "outside the record." Exhibit 29 we are  
9 not objecting to.

01:52:02 10 THE COURT: Okay.

11 MS. FUDIM: That is -- that is all the data  
12 that plaintiffs are proffering. We don't object to  
13 Exhibit 29 in any capacity.

14 THE COURT: So 2 through 28 and 30 through 37  
01:52:12 15 as outside the record.

16 19 through 28 and then 30 through what on  
17 relevance, 402?

18 MS. FUDIM: 37, Your Honor.

19 THE COURT: 37. Okay. Are there any  
01:52:23 20 objections to 38 through 41? I guess you haven't seen 41  
21 yet.

22 MS. FUDIM: I haven't seen 41. But based on  
23 what it's been represented to be, no, I assume it's been  
24 accurately represented. So, no, there is no objection to  
01:52:35 25 38, 39, 40, and 29.

1 THE COURT: All right. So 38 through 41 and  
2 29.

3 What about -- I saw that a stipulation was  
4 filed with respect to the Declarations 4 through 7.

01:52:54 5 Are those -- are those -- what are your  
6 objections to those? Are those just the outside-the-record  
7 ones or anything else?

8 MS. FUDIM: No. Those don't come within the  
9 outside-the-record because we're considering those -- those  
01:53:07 10 declarations as -- to be construed as declarations in lieu  
11 of testimony. So those don't fall within that objection.  
12 We have filed separate motions in limine with respect to  
13 two of those --

14 THE COURT: Okay.

01:53:19 15 MS. FUDIM: -- which I am prepared to speak to  
16 as soon as the Court would -- I don't know if you want me  
17 to speak to those now --

18 THE COURT: Well, I'm trying to figure out the  
19 categories -- like I said, the buckets of objections. And  
01:53:28 20 so I have got the extra-record.

21 And you had said 2 through 28, but it  
22 sounds like with respect to those Declarations 4, 5, 6, and  
23 7, there may be two that you don't object to as outside  
24 the -- and I'm not sure how -- because none of those  
01:53:40 25 declarations were in the record, right?



1 MS. FUDIM: We're not objecting -- let me --  
2 perhaps I misheard and misspoke. We are not objecting to  
3 any of the declarations on the ground that they are outside  
4 the record.

01:53:47 5 THE COURT: Okay.

6 MS. FUDIM: Because we're viewing those as  
7 testimony.

8 THE COURT: All right. So that would be then.  
9 Because, like I said, I just want to make a clear record  
01:53:55 10 for what your individual objections are in these buckets.

11 So 2 through 3 and then --

12 MS. FUDIM: 2 --

13 THE COURT: Go ahead. Go ahead.

14 MS. FUDIM: Yes, 2 through 3 fall within  
01:54:07 15 outside the record.

16 THE COURT: Right.

17 MS. FUDIM: That continues from 8 --

18 THE COURT: Right.

19 MS. FUDIM: -- all the way down to 28.

01:54:13 20 THE COURT: Right.

21 MS. FUDIM: Continues again at 30 and goes down  
22 to 37.

23 THE COURT: Got it.

24 All right. And then you have got 402  
01:54:20 25 objections.

1 MS. FUDIM: We have 402 objections, Your Honor,  
2 to 19 --

3 THE COURT: Through 28.

4 MS. FUDIM: -- through 28; and then 30 to 37.

01:54:38 5 THE COURT: All right. So -- and then you said  
6 you do not have objections to 29; 38 through 41.

7 What are your objections, then, to 4  
8 through 7, if any?

9 MS. FUDIM: Okay. So the only objections we  
01:54:52 10 have to those coming in wholesale is with respect to  
11 Ms. Waltz's declaration and Mr. Terry's.

12 So Ms. Waltz is going to be 5, and  
13 Mr. Terry is going to be 6. And I am happy to speak to  
14 those now.

01:55:07 15 THE COURT: Sure.

16 MS. FUDIM: With respect to these declarations,  
17 Ms. Waltz's pertain to criminal justice data, and  
18 Mr. Terry's was relevant to the Texas Educational Agency  
19 (sic), just for background, so we're all talking about the  
01:55:23 20 same thing.

21 With regard to these, we believe they  
22 should be excluded for palpable irrelevance. I, of course,  
23 understand that this is a bench trial, and the Court can  
24 weigh evidence --

01:55:31 25 THE COURT: Right.

1 MS. FUDIM: -- and figure out, you know, what  
2 weight, if any, should be attributed to various testimony  
3 when it adjudicates the case.

4 But ultimately, these declarations are so  
01:55:43 5 facially irrelevant, and given that Rule 402 states in no  
6 uncertain terms that irrelevant evidence is not admissible,  
7 and that there is not going to be further testimony in this  
8 case tomorrow, that now would be just as appropriate a time  
9 for the Court to make a ruling with respect to it.

01:56:02 10 So with respect to Ms. Waltz's  
11 declaration, for example -- well, first of all, let me say  
12 this: Plaintiffs have noted in their opposition to our  
13 motion to preclude that federal defendants maintain that  
14 the data discussed by Ms. Waltz is irrelevant because it is  
01:56:19 15 not specific to the beneficiaries of the CHNV parole  
16 program.

17 So let me say this clearly. That is not  
18 what our objection is. It very well may be the case that  
19 if plaintiffs could show that the number of CHNV nationals  
01:56:35 20 paroled into Texas were going up post the implementation of  
21 these policies, then we might indeed argue that there is a  
22 lack of standing or a lack of relevance because they  
23 haven't tied their costs to these specific individuals.

24 But let me say clearly, that is not the  
01:56:49 25 argument that we are making at this time with respect to

1 the exclusion. What we are saying is that the declarations  
2 are irrelevant because they do not contain any data  
3 whatsoever that postdates the filing of this complaint or  
4 the implementation of the four parole policies that are  
5 being challenged. What they say is that only in the past  
6 there have been costs to the State from incarcerating  
7 people.

8                   Of course, there have been costs to the  
9 state from incarcerating people. That is probably true of  
10 every state in the country. States incur costs from  
11 incarceration. That is only relevant here if there is some  
12 nexus to these programs. And there could be argument later  
13 on about whether that nexus needs to be at the individual  
14 level or whether it can be a broader inference that, with  
15 numbers at a certain level, one could infer that some of  
16 the people might be within this subset, and that is an  
17 argument for another day.

18                   But here the data that is being proffered  
19 all predates the implementation of these processes. So  
20 there is no comparator. It is not the case that Texas can  
21 say, well, the numbers have gone up. So if you compare the  
22 before numbers to the after numbers, there are inferential  
23 arguments that we would want to make. If that were the  
24 case, we would not be objecting wholesale to this  
25 declaration. We would make our arguments within our

1 argument section of this case.

2 But here there is no data that is being  
3 offered that postdates the implementation of these  
4 programs. And so there can't possibly be any relevance to  
01:58:17 5 the fact that, okay, the State had costs from incarcerating  
6 people. Not these people. It's impossible that it is  
7 these people under this program because this program hadn't  
8 even been created yet as relevant to the data that is being  
9 offered.

01:58:31 10 So that is our objection with respect to  
11 Ms. Waltz's proffered declaration.

12 And, again, with respect to -- with  
13 respect to Mr. Terry, the same holds true. The data -- I  
14 mean, we did make a note in a footnote that it's also  
01:58:49 15 irrelevant because it pertains to unaccompanied children,  
16 and the four processes that are being litigated here do not  
17 permit admissions of unaccompanied children. So it is  
18 irrelevant for that reason as well. And that is the  
19 primary reason that Texas grapples within its response.

01:59:06 20 But that was really just a footnote for  
21 us. I mean, the preliminary issue is that all of the data  
22 with respect to the fact that Texas incurs costs to educate  
23 children, whoever those children are, you know, no one is  
24 arguing that states incur costs to educate children. That  
01:59:21 25 is true everywhere in this country, presumably. But,

1 again, all of that data predates these processes with no  
2 corollary coming after the implementation.

3                   So there is nothing to compare it to. And  
4 for that reason, we submit that it is palpably irrelevant,  
01:59:38 5 and now would be just as good a time as any for the Court  
6 to make that finding because there is no additional  
7 information to come in to change that, to make it a wiser  
8 move to withhold ruling on that basis.

9                   And so that is all I have unless the Court  
01:59:55 10 has any questions, Your Honor.

11                   THE COURT: All right.

12                   Do we want to go to the intervenors --  
13 first off, do the intervenors have objections that  
14 are other than what have already been lodged?

02:00:09 15                   MS. RIVAS: We do, Your Honor.

16                   THE COURT: Okay. Go ahead.

17                   MS. RIVAS: So, first of all, I am happy to  
18 clarify the specific exhibits that we are objecting to,  
19 just to --

02:00:18 20                   THE COURT: Right.

21                   MS. RIVAS: -- be sure we are on the same page  
22 with the buckets.

23                   And so we, in our motions in limine or  
24 motions to exclude, argued that Exhibits 5 through 7 are  
02:00:28 25 inadmissible because of their lack of relevance.

1 For Exhibits 4 through 7, we argue that  
2 those are inadmissible under 602 and 701.

3 And then we also shared the argument with  
4 the federal defendants that Exhibits 31 through 37 are  
5 irrelevant.

02:00:48

6 THE COURT: Okay.

7 MS. RIVAS: And so if I may, just in terms of  
8 the irrelevance argument, if I can add a little bit to what  
9 federal defendants have argued.

02:01:03

10 It's our position that these are patently  
11 irrelevant because plaintiffs assert that there --

12 THE COURT: What numbers are you talking about  
13 right now?

14 MS. RIVAS: Sorry. This is Exhibits 5 through  
15 7.

02:01:14

16 THE COURT: Okay.

17 MS. RIVAS: And so those exhibits are not  
18 relevant to show standing because they -- the declarants  
19 are including data that is about populations that are

02:01:25

20 completely distinct from the populations at issue in this  
21 case, which are the CHNV beneficiaries. And so there is no  
22 way that we can have any kind of inference as to the costs  
23 that Texas is incurring from the CHNV beneficiaries from  
24 looking at populations that are completely distinct and

02:01:43

25 have completely different characteristics.

1 We also, then, move to exclude Exhibits 31  
2 through 37 for irrelevance. And those, of course, are  
3 immigration forms that are completely unrelated to the CHNV  
4 pathway process that is at issue in this case. And so we  
02:02:03 5 share the argument with the federal defendants that  
6 these -- this testimony and this evidence should be  
7 excluded now before trial. There is no reason to wait  
8 until tomorrow. And should the Court decide to admit it  
9 anyway, we would submit that it should hold zero weight.

02:02:21 10 And so if Your Honor would like, I can  
11 talk in a little bit more detail about the Exhibits 4  
12 through 7 on the 701 and 602 grounds.

13 THE COURT: Okay.

14 MS. RIVAS: So these are the declarations of  
02:02:37 15 Mr. Lopez; and Mr. Terry; Ms. Bricker; Ms. Waltz; and  
16 Ms. Gibson. And it is our opinion that these are improper  
17 lay opinion testimony and that they lack personal knowledge  
18 as required by Rule 602. The plaintiffs did not designate  
19 these declarants as experts under Rule 702, and so their  
02:02:57 20 expert -- excuse me -- their testimony could only be  
21 offered under Rule 701. But as lay witnesses, their  
22 declarations simply permit impermissible opinion testimony  
23 that exceeds the bounds of Rule 701.

24 And so specifically, the Terry  
02:03:19 25 declaration, which is Exhibit 6, they admit that they



1 haven't received any information from the federal  
2 government about the number of unaccompanied children in  
3 Texas. First of all, federal defendants mention  
4 unaccompanied children are inherently and uncategorically  
02:03:35 5 not eligible for the CHNV Pathways. And so the declaration  
6 is using data on this unrelated population. And they  
7 haven't explained in any way how they reached their  
8 conclusions, if they can reach that conclusion at all, that  
9 the cost of educating an unaccompanied child would help the  
02:03:59 10 Court decide the issue of whether the CHNV beneficiaries  
11 are causing Texas to incur costs.

12                   They also make projections and  
13 assumptions, like how all unaccompanied children would need  
14 bilingual compensatory education and assuming that every  
02:04:16 15 unaccompanied child would be in school for the full year.

16                   Similarly, the Bricker declaration, which  
17 is Exhibit 7 -- and that's Ms. Bricker from the Health and  
18 Human Services Commission -- she details lots of complex  
19 methods and resulting estimates that are based on data and  
02:04:34 20 assumptions, but doesn't state that she has anything to do  
21 with coming up with those analyses that she comes to in her  
22 declaration.

23                   And so we are not debating or challenging  
24 the accuracy of the data per the stipulation, which is ECF  
02:04:54 25 251 -- we are not challenging the reliability of the data,

1 but just the fact that, of course, these employees of Texas  
2 agencies may very well be qualified to speak to the costs  
3 of the services that their agencies provide, but they go  
4 beyond that in their declarations. They make projections  
5 that, frankly, they are not qualified to do, beyond just  
6 speaking to the costs.

7                   Moving to Ms. Waltz's declaration, which  
8 is Exhibit 5 -- and she's from the Texas Department of  
9 Criminal Justice -- she offers unsupported opinions about  
10 the costs related to noncitizens writ large. But again,  
11 noncitizens is a class of individuals that are separate  
12 from the CHNV beneficiaries. They are not based on her  
13 perception. There is no evidence of her personal knowledge  
14 to be able to make these conclusions. And, again, this is  
15 because there is no basis in the declarations in order to  
16 determine that Texas is incurring greater costs than it  
17 would without the CHNV programs.

18                   And finally, we object to the Gibson  
19 declaration, which is Exhibit 4. And Ms. Gibson is from  
20 the Department of Public Safety. And she offers  
21 projections that are based on technical and specialized  
22 knowledge of the Texas Transportation Code, driver's  
23 licenses, processes, databases, complex mathematical  
24 analysis, and predictions based on this information. But,  
25 again, this is more of an economic analysis that she

1 doesn't purport to have, as an employee of the Texas -- the  
2 Texas Department of Public Safety.

3                   So for instance, she makes predictions  
4 about the need for additional facilities and how that would  
02:06:48 5 grow in a linear fashion. But these all go beyond, again,  
6 her ability to speak to the costs that issuing a driver's  
7 license would incur. It goes beyond that.

8                   And then as for -- so -- yes. So those  
9 are our arguments as to Exhibits 4 through 7 on  
02:07:18 10 impermissible lay opinion testimony and lack of personal  
11 knowledge.

12                   THE COURT: All right. You said you had --  
13 also exhibits -- objections to Exhibits 31 through 37?

14                   MS. RIVAS: Yes.

02:07:30 15                   THE COURT: Okay. Are those in addition to  
16 what Ms. Fudim -- is that how you say your last name? I  
17 have been calling you "Fudeem." And I apologize --

18                   MS. FUDIM: No. You just got it right just  
19 now. And it's never been -- no judge has ever gotten it  
02:07:42 20 right the first time.

21                   THE COURT: All right.

22                   MS. FUDIM: So you did; that is correct.

23                   THE COURT: I apologize.

24                   Did you have any objections that were --

02:07:50 25 other than what Ms. Fudim had just articulated?

1 And I am not trying to put you on the  
2 spot. If you don't know, go ahead and reurge them. I  
3 just -- just trying to figure out if there are categories  
4 or arguments that I haven't already heard.

02:08:06 5 MS. RIVAS: Yeah. We generally share the same  
6 objections, that they are irrelevant because they are about  
7 processes that are completely different from the  
8 immigration process at issue here.

9 THE COURT: Okay. Anything else?

02:08:23 10 MS. RIVAS: That's it. Thank you.

11 THE COURT: That's all right.

12 Mr. Walters, are you taking the lead on  
13 this?

14 MR. WALTERS: Your Honor, I'm just going to  
02:08:31 15 address, if I may, one discrete issue, and Mr. Suarez is  
16 going to take the bulk of the arguments.

17 THE COURT: All right.

18 MR. WALTERS: The issue of -- and we've briefed  
19 this in our responses to the motions -- response to the  
02:08:44 20 motions to exclude -- the -- the supposed lack of  
21 connection between the data of the particular categories of  
22 people and the specific CHNV parole program, this has been  
23 addressed --

24 THE COURT: And to make sure I understand,  
02:09:01 25 before you go into that, they're saying that you're

1 making -- you're providing data that is writ large to  
2 everyone, or everyone who may be coming in to the country  
3 without permission, as opposed to people who are of this  
4 particular -- these four countries. Is that kind of an  
02:09:20 5 oversimplification of the general link that you say is  
6 missing from that data?

7 MS. FUDIM: I think it is, because I think that  
8 that is part of it. And I think if that was the only part  
9 of it, we wouldn't be making this as a motion in limine.  
02:09:29 10 We would address that in our briefing, and we would address  
11 that in our argument. And I think that is part of what I  
12 heard intervenors talk about more specifically.

13 THE COURT: Right.

14 MS. FUDIM: I think, for us, there is another  
02:09:39 15 step before you get there, which is if you have data from  
16 before these processes --

17 THE COURT: Right.

18 MS. FUDIM: -- and you have data from after  
19 these processes, then you can say, okay, but it is not the  
02:09:49 20 same groups of people.

21 So is there still a link?

22 THE COURT: So I have got two issues that you  
23 had. One is that it predates this program. All of the  
24 data and the numbers come from the -- that predate this  
02:10:01 25 program. The other is that it's not limited or has any

1 focus on the four countries at issue; instead, it's all the  
2 population at large.

3 MS. FUDIM: Yes. But that second argument is  
4 not one upon which we are basing --

02:10:09 5 THE COURT: Right.

6 MS. FUDIM: -- the motion to exclude at this  
7 time. I think those arguments would properly be cabined in  
8 the arguments section of this case, for what is the weight  
9 and why does that matter and what inferences can be drawn.

02:10:23 10 But I just think in terms of syllogisms in general --

11 THE COURT: Right.

12 MS. FUDIM: -- there is no way to extrapolate  
13 from data to even say that its numbers are caused by these  
14 processes when you don't have any data --

02:10:35 15 THE COURT: Right.

16 MS. FUDIM: -- not a single number in these  
17 declarations that postdate these processes, that you don't  
18 get to that second argument because you are still on the  
19 first step, which is not that these are different

02:10:47 20 populations. It is just that we don't even have from a  
21 temporal process data that postdates these processes. So  
22 there is no logical syllogism that can be brought forth.

23 And that is our concern with these two  
24 declarations. And that is why we objected to 2 and not 4

02:11:02 25 because we think perhaps there are better arguments, and we

1 still will argue against it later when we get to the  
2 argument phase. But with respect to the two that we're  
3 challenging, there is not one iota of data that postdates  
4 these processes.

02:11:15 5 MR. WALTERS: Your Honor, as to the postdating  
6 issue, in the DACA case, in the Fifth Circuit, from October  
7 of last year, they specifically relied on -- the DACA  
8 program was initiated in 2012. They explicitly in the  
9 opinion relied on data from 2006 and 2007 as to public  
02:11:31 10 hospital spending from the state of Texas, in support of  
11 our standing.

12 THE COURT: Being offered for what purpose, to  
13 show injury?

14 MR. WALTERS: Yes, Your Honor, to show  
02:11:39 15 standing.

16 These are the same sorts of dec- -- we use  
17 the same sorts of declarations. They're virtually  
18 identical, just updated for data, in all these immigration  
19 cases, going from DAPA to DACA to MPP to prioritization to  
02:11:52 20 this case, Your Honor.

21 THE COURT: So the Fifth Circuit case, you said  
22 was from last year?

23 MR. WALTERS: Yes. October 5th of last year.

24 THE COURT: And that came from Judge Hanen?

02:11:58 25 MR. WALTERS: No. This was the Fifth Circuit.

1 This was Judge Richman.

2 THE COURT: Okay. So -- well, I am talking  
3 about -- but that record came to them from a trial court.

4 MR. WALTERS: Exactly.

02:12:06 5 THE COURT: And so when was that trial court  
6 decision or that --

7 MR. WALTERS: The trial court decision was from  
8 July of 2021, the motions for summary judgment.

9 THE COURT: All right.

02:12:16 10 MS. FUDIM: If I could respond to that briefly.

11 In the DACA and the DAPA case, there was a  
12 survey done, and it was part of the evidence in that case,  
13 that showed that approximately 20 percent of individuals,  
14 who were -- and I think this number was from the DACA case,  
02:12:32 15 although I believe there was some similar data from DAPA.  
16 But 20 percent of DACA individuals who would fall into that  
17 policy would leave the state, if the policy -- you know, if  
18 DACA were not going to go forth; that they would return to  
19 their home countries.

02:12:45 20 And so knowing that number, you could sort  
21 of tie that number to costs, which independently existed at  
22 a historical level. And you were talking about individuals  
23 that were already present within the United States.

24 In this case, we're talking about policies  
02:13:01 25 that were implemented on a certain date, and we have no



1 data from afterwards. So it is not a question of, well,  
2 would people leave, or these people are already here, and  
3 knowing that these people are already here, what does it  
4 cost to educate the child? Or what does it cost to  
02:13:16 5 incarcerate an individual?

6 We are talking about the fact that these  
7 individuals are -- would be coming under these processes,  
8 and we have no data to show that any of these individuals  
9 are tethered to the data they put forth because the data  
02:13:30 10 they've put forth predates these processes.

11 And if one could simply reuse declarations  
12 from DACA and DAPA and MPP again and again and again for  
13 standing, I mean, where does the line get drawn? Could we  
14 have a case in 15 years that just submits these same  
02:13:43 15 declarations to the courts again and again and again?

16 I mean, I would submit that, you know,  
17 every state in the country, presumably, incurs costs from  
18 incarcerating people, whoever those people are, whether  
19 those people are noncitizens or citizens. Every state in  
02:13:57 20 the country incurs some costs from educating children,  
21 whether those children are citizens or noncitizens.  
22 Those -- those concepts are axiomatic.

23 THE COURT: Can I ask you something real quick?  
24 I mean, I understand that argument. Can I ask you  
02:14:10 25 something real quick, because I have always heard, is one

1 dollar of damage enough? You understand what I am saying?

2 Okay. So I think I have listened to a  
3 couple of the immigration Supreme Court arguments and the  
4 Fifth Circuit arguments, and it seems like hovering around  
02:14:22 5 is this question of, is one dollar of damage enough?

6 And so the question is, is it your  
7 argument that even without showing the exact numbers or a  
8 correlation to that specific population group, even if it  
9 predates this program, that they would not be able to use  
02:14:35 10 that data to show that they have got at least one dollar?

11 MS. FUDIM: Well, that is correct. I mean, our  
12 position is -- obviously, we have arguments against the  
13 one-dollar-amount concept.

14 THE COURT: Right.

02:14:44 15 MS. FUDIM: But caveating that, I think in the  
16 first instance, one would have to show -- and I think Texas  
17 would probably agree to this -- and maybe they don't want  
18 to do so orally. But if you look at their proposed  
19 findings of fact and conclusions of law, as well as their  
02:14:57 20 opposition to our motion in limine, there's many sentences  
21 they have where they write things like, if the number of  
22 CHNV internationals increases, there would then be costs.

23 And even, for example, where they are  
24 citing to the MPP case, they write in opposition to the  
02:15:15 25 motion in limine: "The Fifth Circuit has already held that

1 Texas suffered an actual injury sufficient to establish  
2 standing, when it was shown that a large-scale immigration  
3 policy would increase the number of aliens applying for  
4 driver's licenses, healthcare benefits," evaluating the  
02:15:29 5 same evidence in the declarations here.

6 And I think that "if," that to the extent  
7 that -- that "if," if the numbers go up, then maybe you can  
8 show that. And that is, again, putting aside the argument  
9 of can you tether specific costs to specific people from  
02:15:44 10 specific programs. Let's say you -- let's say you don't  
11 need that, just for the sake of argument.

12 THE COURT: Right.

13 MS. FUDIM: Assuming you don't need that, you  
14 still need to show a single dollar -- under the  
02:15:53 15 single-dollar-of-injury argument, you still have to show  
16 that there is at least more people coming who may go to  
17 jail or may get educating (sic), and putting aside that,  
18 again, those are speculative, in our view, would those  
19 individuals end up in jail? Would they be in the public  
02:16:10 20 for schools for how long with the cost? Put that aside.

21 Say we lose on all of that. You still  
22 have to show that you have an increase. And that's -- the  
23 Fifth Circuit's said the same. You still have to show that  
24 there is an increase in the number of people. And we will  
02:16:23 25 get to the fact, when we argue our evidence tomorrow, that

1 the data shows that there has been a decrease, not an  
2 increase.

3 But even putting that aside, because we're  
4 not in the argument phase, when you look at these

02:16:32 5 declarations, in order for them to be relevant, you would  
6 have to show that there is data from before the policies  
7 and after the policies, or you can't get to that one dollar  
8 of damage. There is no way to get there if you only have  
9 data temporally from before the point in time when these

02:16:48 10 processes were implemented.

11 And that's what these declarations are.

12 They are just information. Like, if you look at

13 Ms. Waltz's declaration, she proffers -- with respect to  
14 the most recent declaration. There were others attached to

02:17:00 15 both the motion for preliminary injunction, as well as the  
16 motion for the TRO. And there were other declarations that  
17 she filed in other cases, which were produced in the course  
18 of discovery. If you look at all of them, there is data  
19 from 2017, 2018, 2019, 2020, '21 -- through '21 of the cost

02:17:18 20 of incarcerating people. And notably, if you did look at  
21 all of those declarations, what you would actually see is  
22 that the cost has gone down year by year.

23 But putting that aside, and even just  
24 looking at the most recent declaration, it completely

02:17:31 25 predates these programs. So there is just no possible

1 relevance of that data if you are not also, somewhere else,  
2 going to have data postdating.

3                   Now, if they had, somewhere else, data  
4 postdating the programs, we would then get to, well, is  
02:17:45 5 there even one dollar of damage? And is that enough? And  
6 do you have to tether that specific dollar to a specific  
7 person? Or do you have to show that these CHNV nationals  
8 are the people who are going to prison? And those are  
9 different arguments, and we will cabin those for tomorrow.

02:18:01 10                   THE COURT: Right.

11                   MS. FUDIM: Regale you with our thoughts on  
12 that.

13                   But for right now, you are still at the  
14 door, which is there isn't even this second body of  
02:18:09 15 numbers. And so absent that second body of numbers, what  
16 is the possible relevance of her declaration? Her  
17 decoration says it costs money to incarcerate people. Of  
18 course it does.

19                   THE COURT: Right.

02:18:18 20                   So doesn't that have to be in the record,  
21 though, the fact that it does cost money? I mean, you  
22 can't just -- I mean, I can't take judicial notice of it.

23                   I guess my question is, does the same  
24 affidavit have to have evidence of both the fact that it  
02:18:29 25 costs money to incarcerate people and numbers have

1 increased under this program? Can't the numbers that have  
2 increased under this program be in a different piece of  
3 evidence?

02:18:42 4 MS. FUDIM: Yes, it could. Except there are --  
5 if there was a separate declaration that said that or a  
6 separate source of that information, then, yes, I would say  
7 they can -- they can introduce -- in any case you can  
8 introduce an exhibit subject to connection.

02:18:56 9 THE COURT: Right. And that is -- and that is  
10 my question. And I just want to make sure I'm  
11 understanding what everybody is saying.

12 At least for purposes of establishing,  
13 Fifth Circuit has recognized it, kind of common sense  
14 recognizes that it costs money to incarcerate people.

02:19:05 15 But doesn't it need to be in the record  
16 somehow, whether it predates or postdates the program?  
17 Doesn't this at least get that basic fact in, even if it  
18 predates the program?

02:19:18 19 MS. FUDIM: I would say if there's a separate  
20 piece of evidence that they can point to as an offer of  
21 proof that -- that establishes the relevance of the first  
22 piece. When you admit an exhibit subject to connection, if  
23 the subsequent connection is never made, then the first  
24 piece of evidence doesn't come in.

02:19:31 25 THE COURT: Well, I mean, I don't know that it

1 would -- in a bench trial, it's a little different. I  
2 might just say, well, you offered that to show that it  
3 costs money to incarcerate people. However, I never saw  
4 what the new numbers were, or I never saw that there was a  
02:19:42 5 change, and so I am not going to consider that.

6 But, I mean, I -- what -- I guess what I  
7 am thinking is, is that the fact that it costs money,  
8 whether it's for a driver's license, for education, for  
9 healthcare, for incarceration, there has to be some piece  
02:19:55 10 of evidence in the record that proves up that that costs  
11 the State dollars. I can't just take judicial notice of  
12 it. And if they fail to link it to the program in any way,  
13 then I just -- the finding of fact reflects that.

14 MS. FUDIM: Give me one second.

02:20:08 15 THE COURT: Sure.

16 MS. FUDIM: I want to just ask one question.

17 THE COURT: Mr. Walters, you have done a great  
18 job talking --

19 MR. WALTERS: I do have something to say, Your  
02:20:21 20 Honor.

21 THE COURT: I will circle back, of course.

22 MS. FUDIM: I mean, I think what -- I just  
23 wanted to check in with my colleague --

24 THE COURT: Sure.

02:20:37 25 MS. FUDIM: -- is that there is -- that I won't

1 find myself at the end of being yelled at tomorrow if I say  
2 this, for my job --

3 THE COURT: At least not from me.

4 MS. FUDIM: Okay. Well, again, federal

02:20:46

5 government can stipulate that it costs money to incarcerate  
6 people. I mean, not -- obviously not -- we're not  
7 stipulating with respect to any particular population, but  
8 just the general idea that it costs the State money to  
9 incarcerate people, there is --

02:20:59

10 THE COURT: Okay.

11 MS. FUDIM: There is no dispute. It costs  
12 money -- it costs the State money to incarcerate people  
13 regardless of who those people are. It costs the State  
14 money to educate people regardless of who those people are.

02:21:09

15 And if that is the only fact that these declarations have  
16 any possible relevance to, we can, you know, stipulate to  
17 those basic facts. But these declarations go on to, you  
18 know, provide more intricate data, none of which -- none of  
19 which is relevant to anything, for the reasons I have  
20 stated.

02:21:25

21 THE COURT: Mr. Walters got highjacked. I  
22 think we highjacked your response. Go ahead.

23 MR. WALTERS: Your Honor, so in the MPP case,  
24 this was addressed. DHS made this same argument, that we

02:21:35

25 did not have any specific evidence that any people who were



1 paroled from the termination of MPP had used any of the  
2 services. And, in fact, all of the declarations that we  
3 had in that case, which are the same sort that we had here,  
4 all predated the termination of MPP.

02:21:47

5 We had originally filed the lawsuit after  
6 there was a pause in enrollment in MPP at the beginning of  
7 the administration. Then there was a preliminary  
8 injunction motion. These declarations were attached to  
9 that. Afterward, we had to amend our complaint, but -- and

02:22:03

10 re-up our preliminary injunction motion, but we kept the  
11 same exhibits as when they actually terminated the MPP  
12 program.

13 So all of those declarations were about  
14 data that predated the termination of MPP, which is what  
15 caused the increase in parole -- in parolees into the  
16 country.

02:22:15

17 And Judge Oldham's opinion specifically  
18 addressed this argument, where -- saying that DHS says that  
19 there is no evidence that any -- any of these parolees  
20 that were paroled as a result of the termination of MPP  
21 used any of these benefits. And Judge Oldham said that is  
22 not required; that, in fact, it would be impossible for a  
23 State to show that because there is always some chance that  
24 any of these people paroled could have been paroled under

02:22:30

02:22:47

25 some other circumstance. So you can never point to a

1 specific person who -- who was a parolee and say this  
2 person was definitely paroled because of the termination of  
3 MPP and would not have been paroled under any other  
4 circumstance.

02:23:01 5 THE COURT: Do we not have the ability in this  
6 case to figure out if people were paroled specifically  
7 pursuant to this program? Like, if people are paroled  
8 through this program, from the four-country program, are  
9 there -- are they categorized or does the data indicate

02:23:15 10 that it is part of this program?

11 MS. FUDIM: Yes. And what we are going to show  
12 when we get to evidence tomorrow is that the number of  
13 individuals of Cuban, Haitian, Nicaraguan, and Venezuelan  
14 origin who have been released into this country both under  
02:23:30 15 this program and through other processing pathways, so  
16 looking at the total number of individuals or -- too fast?  
17 I'll slow down.

18 THE COURT REPORTER: Back up to Venezuelan  
19 origin...

20 MS. FUDIM: -- individuals of Cuban, Haitian,  
21 Nicaraguan, or Venezuelan who have been released into this  
22 country, both under the CHNV parole processes, as well as  
23 through those processes, and in addition to other Title  
24 VIII processing pathways, that those numbers have gone down  
02:24:00 25 since the implementation of these programs.

1                   So there are fewer of -- fewer individuals  
2 from these countries of origin since these programs were  
3 promulgated.

02:24:13

4                   THE COURT: All right. But you've kind of  
5 gotten off my topic.

02:24:28

6                   My question was, are we able to link this  
7 program to specific -- to the specific people coming in  
8 from the four countries, as opposed to the MPP, just kind  
9 of a global parole? You couldn't -- what I heard

10 Mr. Walters saying was that Judge Oldham said --

11                  MS. FUDIM: Yes.

12                  THE COURT: -- that you couldn't tell whether  
13 or not these people were paroled via the MPP or some other,  
14 so it is impossible.

02:24:38

15                  MS. FUDIM: We can.

16                  THE COURT: My question is, can you directly  
17 figure out whether or not individuals were paroled specific  
18 to this program?

19                  MS. FUDIM: Yes. We have produced that data.

02:24:46

20                  THE COURT: Okay.

21                  All right. Mr. Walters, go ahead.

22                  MR. WALTERS: Yes. So DOJ is making this sort  
23 of offset argument, which is, you know, something that the  
24 Fifth Circuit has said you can't do.

02:25:00

25                  So just recently in the *GLO v. Biden* case

1 in the Fifth Circuit, just a month or two ago, DHS had  
2 argued -- this was about the border wall, the failure of  
3 the Biden administration to spend money on building a  
4 border wall as Congress had demanded. And Judge Jones in  
02:25:23 5 an opinion for the Fifth Circuit talked about DHS making  
6 the argument that, well, we actually -- we have -- we spent  
7 this money on alternative means of securing the border,  
8 technology, and, therefore, Texas has no evidence that --  
9 that there is an increase in immigration into the state as  
02:25:46 10 a result of this.

11 And Judge Jones rejected that based on  
12 the -- the anti-offset principle of the DAPA case, saying,  
13 like, that is -- you can't look at some different program  
14 or aspect of immigration policy. Under the APA, we have  
02:26:00 15 to -- we can't make a programmatic challenge to federal  
16 immigration policy. We have to challenge particular agency  
17 actions.

18 That particular action here is the parole  
19 program. You only have to look at -- we are only able to  
02:26:12 20 challenge the parole of these people. And they can't use  
21 some, you know, butterfly effect, you know, secondary  
22 effects on how it affects other people in these countries  
23 who decide not to come, or how it affects other countries,  
24 how they react. That -- that is -- that violates that sort  
02:26:29 25 of anti-offsetting principle. It is not part of the same

1 transaction or occurrence, and it is an accounting  
2 exercise, as the Fifth Circuit has said.

3                   So even if there is a reduction from some  
4 other program like the asylum -- the anti-circumvention  
02:26:48 5 rule that they are defending in federal court out on the  
6 West Coast, and they have said in their declarations here  
7 that this is a combination of things, that they are using  
8 carrots and sticks and the agreement of other countries,  
9 these third parties, doing things, we can't challenge  
02:27:03 10 those. We haven't challenged those things. So we can't  
11 make a -- like I said, a programatic attack.

12                   We are challenging this particular  
13 program. And they can't point to other things and say,  
14 well, that has actually reduced other people -- it has  
02:27:17 15 prevented other people from coming in; therefore, there is  
16 an overall reduction of people from these countries,  
17 therefore you have no injury.

18                   And in the MPP case, Judge Oldham has  
19 talked about, like, you can use general statistics. And in  
02:27:29 20 both in DAPA and DACA and MPP, they said it is a certainty  
21 that out of these large numbers of people, that at least  
22 some of them are going to get driver's licenses. Driving  
23 is a necessity. That was taken judicial notice of in those  
24 cases. In Texas, driving is a practical necessity to get  
02:27:46 25 around the state.

1                   So at least some of these people -- and  
2 there have been -- as of the end of June, the data shows  
3 that there are -- almost 14,000 people been released into  
4 the state of Texas.

02:27:54   5                   So we have to show by a the preponderance  
6 of the evidence that we've faced one dollar of injury. So  
7 one -- you know, some of those people have gotten driver's  
8 licenses; some of those people are going to use healthcare  
9 benefits; some of those people are going to commit crimes.

02:28:06   10                  THE COURT: What if they were going to come  
11 in if the program wasn't in place? For example, let's  
12 assume that 15,000 people were coming into the state of  
13 Texas from those four countries, and that would have cost  
14 \$15,000, just to make it easy. Then the program was rolled  
02:28:21   15 out, and the exact same number came in. Is there an  
16 injury?

17                  MR. WALTERS: Yes, because the specific people  
18 being paroled, that is affirmative immigration relief.

19                  THE COURT: But if they were going to come in  
02:28:31   20 anyway without status?

21                  MR. WALTERS: Well, I think what Judge Oldham  
22 has said is you can't do that, in the MPP case. He said  
23 you can't -- that that is why you can't look at the  
24 specific people, whether they are -- because you could  
02:28:45   25 always hypothesize that they would have come in under some

1 alternative. And that's why --

2 THE COURT: For the 100-day pause, for example,  
3 the 100-day pause, it was easy for me to wrap my around an  
4 injury. A 100-day pause means that there are additional  
02:29:00 5 people coming in, and we're not removing anybody. There is  
6 going to be an increase in the number. So that makes it  
7 fairly easy to find an injury. Everybody knows that there  
8 will be a larger number.

9 In this case, am I going to find out that  
02:29:11 10 there's a corresponding dip or increase in numbers from  
11 those four countries or from immigration in general?

12 MR. WALTERS: Well, even if there were, Your  
13 Honor, that would not harm our -- that would not prevent us  
14 from showing standing, because you have to look at the  
02:29:27 15 particular program we are challenging.

16 And this just goes into the whole  
17 offsetting -- you know, you can't show that we're getting  
18 benefits from these people, and you can't show that there  
19 is some alternative things that are going on in federal  
02:29:41 20 immigration policy that are somehow reducing. Obviously,  
21 the parole program itself does not reduce anything, because  
22 it is affirmatively putting people into the country.

23 So their argument is that it affects third  
24 parties who have decided, well, we are not going to come  
02:29:56 25 because of the parole program. And so you are relying on

1 the independent decisions of third parties to show that.

2 THE COURT: Okay. Before we move on and the  
3 torch gets passed, could you address the ultra vires  
4 argument? Does that exist?

02:30:16 5 MR. WALTERS: It does.

6 THE COURT: A separate claim against an agency,  
7 as opposed to the president?

8 MR. WALTERS: It does, Your Honor. In the --  
9 in Judge Kacsmaryk's decision in *Leal*, he had found that  
02:30:29 10 such a claim was still viable.

11 The -- now -- and, you know, in this case,  
12 you know, the -- a distinction to them saying, well, that  
13 was where there was no final agency action. But, of  
14 course, they're arguing there is no final agency action  
02:30:52 15 here.

16 THE COURT REPORTER: I'm sorry, I can't  
17 understand what you are saying. Can I get you to slow  
18 down?

19 MR. WALTERS: Of course, they are arguing there  
02:30:49 20 is no final agency action in the parole programs.

21 So an ultra vires claim is a way to  
22 challenge that, if it is not final agency action. Now, of  
23 course, we say it is final agency action, but they have put  
24 that into dispute.

02:31:05 25 THE COURT: So you are saying if for whatever



1 reason there is not a viable APA action, you have a  
2 fallback to the ultra vires?

3 MR. WALTERS: Yes. If it is because there is  
4 no final agency action reviewable under the APA -- because  
02:31:17 5 their whole argument is the APA supplanted this, right?

6 But when Judge Kacsmatyk analyzed this,  
7 and he said that it is still an open question about that,  
8 and he -- so if it is not reviewable under the APA, which  
9 they have made various arguments as to why it is not, then  
02:31:35 10 it would be reviewable as an ultra vires action if they're  
11 violating a federal statute.

12 THE COURT: You want to address that?

13 MS. FUDIM: Sure.

14 We would dispute that. I mean, when  
02:31:50 15 Congress puts in place a procedural -- I'm trying to come  
16 up with the right word.

17 THE COURT: Yeah. No, I understand it. When  
18 you put in APA, that made ultra vires go away.

19 What happens if the APA isn't here because  
02:32:03 20 there is no final agency action?

21 MS. FUDIM: Then there is just no cause of  
22 action.

23 THE COURT: Because you are saying it has been  
24 preempted?

02:32:09 25 MS. FUDIM: Right. Because then there is just

1 no cause of action. I mean, APA has certain procedural  
2 requirements, and if you can't meet those requirements,  
3 then there just is no cause of action.

4                   It would be akin to if a private  
02:32:19 5 individual were suing, for example, police officers, and  
6 they were suing for Fourth Amendment violations, Congress  
7 has put in place a scheme under Section 1983, that those  
8 causes of action would fall under Section 1983. But if  
9 there were a particular hurdle for 1983 to apply, perhaps  
02:32:38 10 there was a problem of under color of law or some other  
11 procedural prerequisite for 1983, that doesn't mean that an  
12 individual could then sue that officer at equity under the  
13 federal system.

14                   I mean, when Congress puts in place  
02:32:54 15 certain mechanisms for certain causes of action to proceed,  
16 then it is presumed that those -- that actions that look  
17 like a duck, and quack like a duck, and walk like a duck  
18 get corralled into the duck lane.

19                   And here, you know, we can dispute whether  
02:33:13 20 or not there is final agency action. But it still doesn't  
21 convert what is clearly -- you know, if this is going to be  
22 any type of claim, it is clearly an APA claim -- into  
23 something else as a fallback position.

24                   I mean, again, it brings me back to where  
02:33:26 25 I started, which is if that were the case, anytime a party

1 had a claim or they claimed that the government acted  
2 outside of its authorized statutory authority, then you  
3 would always see an APA claim; and you would always see a  
4 fallback ultra vires claim; and then you would always be  
02:33:44 5 able to have extra-record evidence; and then Congress's --  
6 Congress's position that there is no extra-record evidence  
7 would really be language without teeth.

8 THE COURT: Okay. Go ahead, Mr. Walters.

9 MR. WALTERS: Your Honor, there are even more  
02:33:57 10 recent cases in the DC Circuit, I think the most well-known  
11 one is *Chamber of Commerce v. Reich* from 1996 that found  
12 that you could have an ultra vires claim against federal  
13 administrative action.

14 So, you know, I -- if you remember, the --  
02:34:12 15 you know, when you're showing -- when a -- when a federal  
16 official is acting without authority, without any statutory  
17 authority, then, you don't -- they're not protected by  
18 sovereign immunity. The -- there is a cause of action  
19 under the *Armstrong* case from 2015 talks about that, you  
02:34:38 20 know, historically, in equity, there is a cause of action,  
21 an equitable cause of action, independent of any statutory  
22 cause of action, to prevent -- prevent a federal official  
23 from exceeding the bounds of his authority.

24 THE COURT: All right.

02:34:58 25 MS. FUDIM: I guess I would just add, Your

1 Honor, if I may -- I said it earlier, but I'll say it again  
2 just for placement in the record. Again, that's -- in the  
3 *Armstrong* case, Judge -- Justice Scalia said that courts at  
4 equity are still limited by the same statutory limitations  
02:35:14 5 on claims, which I think speaks to this nuanced points  
6 about where it goes if we challenge final agency action,  
7 whether or not it still remains within the ambit of the  
8 APA, which we submit that it is.

9 THE COURT: What about this DC Circuit case  
02:35:27 10 that he is citing from 1996?

11 MS. FUDIM: I'm not familiar off the top of my  
12 head with that case. I don't know if my colleague is and  
13 can speak to it. But that is not one I am familiar with,  
14 so I'd have to --

02:35:35 15 THE COURT: What was that case, again?

16 MR. WALTERS: Your Honor, I think that was a --  
17 a rule issued under the --

18 THE COURT: I thought you said *Chamber of*  
19 *Commerce*?

02:35:47 20 MR. WALTERS: It was Chamber of Commerce  
21 challenging the Secretary of Labor, Robert Reich. It  
22 was a -- an order -- an order disqualifying employers who  
23 hire permanent replacement workers during a lawful strike  
24 from certain federal contracts. And --

02:36:10 25 THE COURT: Did you cite to it in your

1 response?

2 MR. WALTERS: We did not, Your Honor.

3 But Judge Silberman wrote the opinion.

4 And even if the Court lacked ability to entertain review of  
02:36:20 5 a cause of action under the APA, they were able to attack  
6 these regulations implementing an executive order of  
7 President Clinton.

8 So the Secretary of Labor was implementing  
9 an executive order of President Clinton, and they said --  
02:36:31 10 the Court found that this was -- exceeded the authority  
11 granted to the Executive in order to regulate federal  
12 contractors. And they said there is no ability to  
13 challenge it under the APA --

14 THE COURT: Do you have it there?

02:36:44 15 MR. WALTERS: Yes.

16 THE COURT: What is it?

17 MR. WALTERS: It is 74 F.3d 1322.

18 It says: "The Chamber of Commerce may  
19 obtain review of the legality of the order through  
02:36:58 20 nonstatutory review auction."

21 MS. FUDIM: And I haven't read the case, but  
22 just from --

23 THE COURT: Neither have I.

24 MS. FUDIM: -- I mean, it wasn't cited, so I am  
02:37:08 25 not familiar with it.

1                   So, you know, I query whether that means  
2 that it can still be challenged and the same actions  
3 supplant the APA; and I query whether that ruling was made  
4 in connection with the use of extra-record evidence.

02:37:21 5 Because that is really why this is relevant here, because  
6 it pertains to whether or not the Court can entertain  
7 extra-record evidence with respect to the ultra vires  
8 claim. And I don't know that that --

9                   THE COURT: Say that again. Say that last  
02:37:30 10 sentence again.

11                  MS. FUDIM: I mean, the reason that we're  
12 having this conversation on the ultra vires claim is  
13 because they want to use extra-record evidence to -- to  
14 adjudicate that claim.

02:37:41 15                  THE COURT: Well, sure.

16                  MS. FUDIM: I don't know whether or not --

17                  THE COURT: I mean, sure. Basically you have  
18 got a limitation on evidence that is friendly to your  
19 position from the APA, and they don't like it. They'd like  
02:37:51 20 to get in more stuff.

21                         And so the question is whether or not that  
22 limitation applies because there is an extra APA claim that  
23 exists. I mean --

24                  MS. FUDIM: Right.

02:38:02 25                         I guess I am just querying, having not

1 seen this case before --

2 THE COURT: I haven't either.

3 MS. FUDIM: -- whether or not there was any  
4 discussion of extra-record evidence there or what was the  
5 context?

02:38:09

6 Because it sounds a little bit like, you  
7 know, the *Watkins v. Willis* case, which I mentioned  
8 earlier, from the Eleventh Circuit maybe would have some  
9 relevance there, where the case is talking about -- in

02:38:21

10 *Watkins*, where the Eleventh Circuit was talking about  
11 whether or not the case is really one that is challenging  
12 the actions of an individual or officer of agent for acts  
13 beyond his statutory or constitutional authority because  
14 such actions are considered individual versus a suit which  
15 is -- you know, as the court said: "If, however, a suit  
16 which is nominally directed against an individual officer  
17 is in substance a suit against the government, sovereign  
18 immunity applies."

02:38:40

19 So I just -- I would be curious where the  
20 intersection of that is with respect to the case that  
21 counsel has referenced, which I have not read.

02:38:52

22 THE COURT: Okay. Okay. Go ahead,  
23 Mr. Walters.

24 MR. WALTERS: Yeah. On that point, Your Honor,  
25 if the cause of action is not pursuant to the APA because

02:39:03

1 of a nonstatutory cause of action, equitable cause of  
2 action, then I don't see how the record rule would apply.  
3 I mean, the record rule arises through the APA. So if the  
4 cause of action is not from the APA, then the record rule  
02:39:21 5 would have no relevance.

6 THE COURT: I mean, so that makes sense to me.  
7 If it's an APA claim, that is only way you get the record  
8 rule. If there is an extra APA claim, then the record rule  
9 doesn't apply, unless it comes up in some other APA --

02:39:35 10 non-APA context.

11 Are you aware of -- I mean, I'm not --  
12 what gets you the record rule is the APA claim.

13 All right. Go ahead, Mr. Walters.

14 MR. WALTERS: I am -- just on the points of the  
02:39:52 15 declarations, Your Honor -- and I'll let Mr. Suarez address  
16 the bulk of the objections -- but we talked about the fact  
17 that any sort of offsets of other immigration policies,  
18 whether it be -- as DHS has mentioned in its declarations  
19 here, you know, they have certain agreements with foreign  
02:40:13 20 countries. They have a -- a sort of stick combined with  
21 the carrot of this policy to prevent people from claiming  
22 asylum, or at least to put limits on it if they cross  
23 through another country. And that's being challenged in  
24 federal court.

02:40:30 25 In San Francisco, a federal judge found



1 that policy, which they have cited as a sort of combined  
2 approach here, found that to be unlawful. Now, that was  
3 stayed by a panel of the Ninth Circuit recently. This is  
4 just in the last month or two.

02:40:49

5 So they're depending on things that may  
6 not -- so we're seeking forward injunctive relief. Just  
7 because something has happened in a month or two, does not  
8 mean that that is something that's happening going forward.  
9 These migrant flows, you know, they increase, they

02:41:06

10 decrease, they rely on lots of different things going on in  
11 those countries, but -- what the governments of those  
12 countries are doing. The governments of those countries  
13 could change. They could change their policies. They  
14 could stop agreeing to take migrants from the CHNV  
15 programs.

02:41:19

16 You can't judge our standing, which is  
17 judged based on the date we filed the complaint on  
18 January 24th of this year, that's when -- even at the  
19 trial, that's when you evaluate standing, when the suit is  
20 filed. If there is some subsequent actions that are  
21 claimed to oust jurisdiction, that is about moot ness. And  
22 no one can really argue this case is moot. But that is  
23 what they would have to argue and they would have the  
24 burden in showing mootness.

02:41:31

02:41:46

25 Whereas here, standing, even at the trial,

1 is determined when you file the suit. You have to have  
2 standing when you file the suit. And we are seeking  
3 forward injunctive relief. So just because something has  
4 happened in a two-month period, doesn't mean that is going  
5 to continue to happen.

02:42:02

6 We don't know if Mexico is going to  
7 continue taking removals from these -- from these four  
8 countries. That could change tomorrow. And we don't lack  
9 standing because of these independent decisions of third  
10 parties, and that also feeds back into the anti-offset  
11 principle, like Judge Jones was talking about.

02:42:17

12 Like just because you could point to some  
13 other thing that is going on that might decrease overall  
14 migration into Texas, that does not mean that when you're  
15 challenging the particular action, which definitely  
16 increases into Texas -- I mean, they're admitting 30,000  
17 people a month through parole.

02:42:32

18 We are challenging that particular agency  
19 action. We are not challenging the gestalt of federal  
20 immigration policy, which the APA does not allow us to do.

02:42:47

21 THE COURT: Okay. All right.

22 Mr. Suarez, go ahead.

23 MR. SUAREZ: Thank you, Your Honor.

24 And if I may just add on very quickly

02:42:59

25 before I get to the ERISA arguments, I think a comment was

1 made where similar -- in 1983 cases, we're not allowed to  
2 attack the -- or try to get injunctive relief if it is not  
3 within the statute. But courts routinely look at *Ex parte*  
4 *Young* and determine whether there is an ultra vires action  
5 outside of what 1983 statute authorizes to grant injunctive  
6 relief against state officials.

7                   What we're saying here is *Larson* applies  
8 to federal officials and that is how we get in that way. I  
9 just wanted to clear that up.

10                   THE COURT: Hold on just a second.

11                   All right.

12                   MR. SUAREZ: As far as the -- I believe  
13 Mr. Walters, he touched on very nicely over why the record  
14 rule doesn't apply because the ultra vires action, so  
15 forth. If we are going to operate under the assumption  
16 that the record rule does apply, as counsel noted, there  
17 are exceptions, and I think the main argument is that we  
18 haven't pointed to any specific evidence that we're looking  
19 to admit as the extra-record evidence as to why that's  
20 relevant here.

21                   I want to note that in our proposed  
22 findings of fact and conclusions of law, we do point to --  
23 to the exhibits. We point to Exhibits 30 through 32, 34  
24 and 29, to kind of supplant the relevance of all that.

25                   And on top of that, as far as the failed

1 agency action -- or sorry, the final agency action, and the  
2 notice and comment claim, it goes to explaining how all of  
3 this applies, and giving context to -- to the Court, and  
4 the record to understand was there a final agency action.

02:44:48

5 Was there implementation of this program? And how it's  
6 been implemented and that is what the records look to do.

7                   Exhibits 19, 21, 30, and -- through 37,  
8 are relevant to showing the parole program and how it sets  
9 up unlawful parallel immigration systems that were not

02:45:05

10 authorized by Congress.

11                   So all of that is to give Your Honor  
12 context, which falls under one of the exceptions -- to give  
13 you context in these highly technical and complex cases,  
14 and would like to note that the extra-record evidence isn't  
15 unprecedented. It has been used in the DAPA cases and the  
16 DACA cases as well. It's something that previous courts  
17 have allowed going forward.

02:45:23

18                   As far as the declarations, I think there  
19 has -- there has been arguments already regarding the  
20 offset, and whether they're relevant under that basis, but  
21 I believe the intervenor defendants also made arguments  
22 regarding lay -- lay witness testimony, and so forth.

02:45:39

23                   It's Texas's position that those arguments  
24 don't apply here. This isn't expert witness testimony.

02:46:03

25 These -- every single declarant, Ms. Waltz, Mr. Terry,

1 Ms. Bricker, Ms. Gibson, they all served some kind of  
2 financial role within their divisions.

3                   For example, Ms. Waltz was the budget  
4 director of TDCJ. Mr. Terry was the CFO of TEA, or the CFO  
02:46:22 5 equivalent. Ms. Bricker was working within the office of  
6 data analytics and performance of HHSC, and Ms. Gipson was  
7 the chief of the DPS driver's license division, and she was  
8 able to testify through -- and they're all able to testify  
9 in their declarations regarding their knowledge of how

02:46:41 10 these costs are affected. And they come to those costs  
11 because it's based off their time spent in those roles, and  
12 their time in those agencies, and so forth.

13                   THE COURT: What are Exhibits 4 through 7 being  
14 offered for? To prove what?

02:46:58 15                   MR. SUAREZ: They're offered to prove the  
16 standing, and to prove --

17                   THE COURT: No, but I mean, specifically, what  
18 element of standing? What are they proving?

19                   MR. SUAREZ: To prove that there is an injury  
02:47:07 20 in effect.

21                   THE COURT: Okay. So you mean dollars?

22                   MR. SUAREZ: Correct.

23                   THE COURT: And so what dollars are we talking  
24 about?

02:47:12 25                   MR. SUAREZ: As far as the -- the injury Texas

1 has suffered because of the -- the harm.

2 So as per TDCJ, the dollars --

3 THE COURT: The incarceration costs, right?

4 MR. SUAREZ: Right, the incarceration costs.

02:47:27 5 The TEA and Mr. Terry, the education costs; or the HHSC,  
6 the healthcare costs; the DPS declaration with Ms. Gipson,  
7 discussing the costs for driver's license. And as the  
8 Fifth Circuit notes, everybody is going to presumably drive  
9 in Texas. So it is not unfounded to note that these people  
02:47:46 10 coming in within CHNV program are going to apply for  
11 driver's license and utilize Texas roads.

12 As --

13 THE COURT: So everything that's in 4 through 7  
14 is going only to standing? Only to injury?

02:48:04 15 MR. SUAREZ: Yes.

16 THE COURT: Okay.

17 MR. SUAREZ: Further, as to the lay witness  
18 testimony, or the lay witness arguments, the Third Court of  
19 Appeals and also the advisory --

02:48:18 20 THE COURT: What number -- what are we talking  
21 about?

22 MR. SUAREZ: As far as the lay witness  
23 testimony, whether it is expert testimony or not.

24 THE COURT: Okay.

02:48:25 25 MR. SUAREZ: Under Federal Rule of

1 Evidence 701, the advisory comment, and also *Lightning*  
2 *Lube, Inc. v. Witco Corp.*, the Third Court -- they found  
3 that "no abuse of discretion permitting plaintiffs' owner  
4 to give lay opinion testimony as to damages, as it was  
02:48:41 5 based on his knowledge and participation in day-to-day  
6 affairs of the business."

7                   And the advisory note notes that  
8 "Importantly, most courts have permitted the owner or  
9 officer of a business to testify to the value or projected  
02:48:53 10 profits of the business without the necessity of qualifying  
11 the witness as an accountant, appraiser or similar expert."

12                   It is true that these aren't businesses,  
13 but it is the same effect. All these declarants were  
14 operating within their business, or within the governmental  
02:49:08 15 agency, and they're able to identify the accounting costs,  
16 or any other costs that may have arose, and that's  
17 specifically what they do. They're discussing how much it  
18 costs to incarcerate these people. How much it costs to  
19 educate children generally. And so, how much it costs to  
02:49:26 20 obtain a driver's license.

21                   So the argument that they lack -- or that  
22 they need to be expert testimony -- or expert witnesses and  
23 they weren't qualified as such is baseless, and, in fact,  
24 of the lay witness testifying what is authorized for people  
02:49:42 25 that are operating within these accounting or financial

1 rules.

2 THE COURT: Let's go through these, I guess, by  
3 categories. It looks like 2 and 3 are Homeland Security  
4 press releases, correct? That's what those are?

02:49:57 5 MR. SUAREZ: Two and --

6 THE COURT: Exhibits 2 and 3. And I'm just  
7 wanting to make sure I have got -- those have been objected  
8 to as extra-record evidence. What are we offering those  
9 for? Because then we have got 4 through 7 that all are  
02:50:19 10 basically the same category; and then we have got 8 through  
11 17, which are all the processing forms; and we just kind of  
12 knock these out and you can tell me what you're offering  
13 each category for, how they fall under whatever exception  
14 it is to the record rule.

02:50:34 15 MR. SUAREZ: Correct. So the --

16 THE COURT: It is okay to double-team. I mean  
17 if you want -- I just want to hear what everybody has to  
18 say.

19 MR. WALTERS: Your Honor, the press releases  
02:50:42 20 are about -- that's where DHS talks about the numbers, and  
21 their intent with this program, so we think it just  
22 provides background information. This is not something  
23 that, you know, goes to a merits determination on any APA  
24 claim. This is to provide context as to what the agency is  
02:50:59 25 doing, and that's sort of the background information. That



1 falls within the exception to the record rule.

2 THE COURT: Ms. Fudim -- I'm going to  
3 mispronounce it all day, sorry. But, Ms. Fudim.

4 MS. FUDIM: No, you are doing well with it.

02:51:13 5 Each of the four records that we filed are  
6 7,000 pages. And so with respect to --

7 THE COURT: We are talking about 2 and 3 right  
8 now?

9 MS. FUDIM: Yes. Yes. So counsel has just  
02:51:23 10 said that these are just for background on what these  
11 programs are about.

12 THE COURT: So if these aren't going to go to  
13 merits, if this is just background and he's specifically  
14 stipulating to that, and I am not going to use it for a  
02:51:33 15 merits decision, then is there -- what is the concern?

16 MS. FUDIM: I think at the end of the day,  
17 we're not hiding from any of this.

18 THE COURT: Right.

19 MS. FUDIM: So I don't think that there is a  
02:51:42 20 concern in there is some smoking gun and this hurts our  
21 case in any way. It doesn't hurt our case in any way.

22 But, you know, ultimately that is not the  
23 standard for admissibility with respect to a record rule,  
24 and it is important for us as the federal government to  
02:51:54 25 take a position --

1 THE COURT: No, I get that.

2 MS. FUDIM: -- that extra-record evidence is  
3 not appropriate in an APA suit, which this is, and that is  
4 the basis. It is not that there's something that we're  
02:52:03 5 hiding from in these documents.

6 THE COURT: And I am not suggesting you're  
7 hiding. What I'm trying to figure out is background  
8 information is an exception to an APA, and if it's  
9 providing stuff that isn't going to go to the merits, am I  
02:52:14 10 getting basically a stipulation that it is not going to do  
11 that, this is going to be how life existed before the  
12 program, then...

13 MS. FUDIM: Well, these are not about how life  
14 existed before the program. These are about the --

02:52:26 15 THE COURT: Why it was rolled out and --

16 MS. FUDIM: About the rollout of the program  
17 itself.

18 THE COURT: Right.

19 MS. FUDIM: And I would, I guess, just go back  
02:52:31 20 to what I said before, that the background information is  
21 not -- you know, it's not as simple as it goes to  
22 background information. The background information cases  
23 have to do with particularly complex cases, almost  
24 exclusively in the scientific arena, and within that almost  
02:52:45 25 exclusively in the NEPA context where the background

1 information has to do with, you know, the, you know,  
2 molecular structure of some river fish that no one has ever  
3 heard of, or sludge in a damn, or atomic particles in the  
4 atmosphere.

02:53:01 5 THE COURT: Right.

6 MS. FUDIM: This is not -- when the Court is  
7 talking about background information, I mean, they are not  
8 talking -- I would respectfully submit they are not talking  
9 about press releases. They talk about, you know, the  
02:53:12 10 rollout of these programs. Again, am I concerned that this  
11 does something to hurt our case? No, I am not.

12 THE COURT: No.

13 MS. FUDIM: But, I mean, I represent the  
14 federal government and the federal government has a  
02:53:19 15 position that in APA cases, the record rule should be the  
16 confining factor and that is the position that I am  
17 advocating for.

18 MR. WALTERS: Your Honor, I think a good way to  
19 think of this is, could the Court take judicial notice of  
02:53:31 20 it? Could the Court, when it is writing an opinion about  
21 the background of the rollout of this program, could it  
22 cite a public press release on DHS's -- DHS's website? Of  
23 course, it could.

24 So it's all about how is the finder of  
02:53:45 25 fact using this evidence. If it is using it for a merits

1 determination, that falls into the record -- that falls  
2 into the record rule; but if it is using it as some sort of  
3 background information, it -- if it could have taken  
4 judicial notice without any party putting it in as an  
02:53:59 5 exhibit, then it can't be objectionable on the basis of  
6 being extra-record evidence.

7 THE COURT: The intervenors have been quiet and  
8 locked out of this for a little while. Do y'all want to  
9 weigh in?

02:54:10 10 MS. RIVAS: Sure.

11 THE COURT: And I am not suggesting you have  
12 to. I just want to make sure you have the opportunity to.

13 MS. RIVAS: Thank you. I guess starting with  
14 the lay witness opinions.

02:54:20 15 THE COURT: Well, I want to do these by the  
16 categories. Right now we're doing 2 and 3. So we are  
17 going to hit that here in a second, but for 2 and 3, which  
18 are the press releases --

19 MS. RIVAS: We have no opinion on that.

02:54:30 20 THE COURT: Okay. Let me ask Texas, how are  
21 you distinguishing this from the newspaper articles that  
22 were offered by the intervenors that y'all were objecting  
23 to?

24 MR. WALTERS: These are governmental documents.

02:54:40 25 Newspaper articles are of a different nature, whereas if

1 you have the government itself issuing a press release and  
2 it's on a governmental website, that is something the Court  
3 could easily just take judicial notice of and --

4 THE COURT: Well, I mean, parties cite  
02:54:57 5 secondary authority to me all the time. I get newspaper  
6 articles. I get law review articles. I get all kinds of  
7 things like that that are cited in briefs that aren't  
8 necessarily evidence. So what about this is something that  
9 you just can't use as part of -- as part of your briefing?

02:55:11 10 MR. WALTERS: Well, this is about a party to  
11 the case, what they have put out; whereas, a newspaper  
12 article, obviously those are people not before the Court,  
13 you can't evaluate what's -- what's in it.

14 And so, again, I think this is just about,  
02:55:28 15 you know, this is to provide context, background  
16 information. No one is saying that this is, you know,  
17 going to make, you know, a determination on the merits. I  
18 think it is about how does the Court -- especially when  
19 you're looking at bench trial like this, this is about how  
02:55:40 20 is the finder of fact using this evidence?

21 Evidence can be used for all sorts of  
22 purposes. If it is used for standing, as we have talked  
23 about, like that's legitimate. If it would be used for the  
24 merits, then that would not be acceptable under the record  
02:55:53 25 rule. But, it's -- that is -- it is the exact same

1 evidence, but it is just how the finder of fact is using  
2 that evidence.

3 THE COURT: Right.

4 MR. WALTERS: And the Court should be able to  
02:56:03 5 make that determination as to what weight, if any, to give  
6 it, and for what purpose it is using that. And that is  
7 how -- that's how it's determined whether it is elicit  
8 extra-record evidence or whether it is being used for a  
9 purpose that is not within that rule.

02:56:19 10 THE COURT: Okay. I am going to overrule the  
11 objections to Exhibits 2 and 3; however, I will not  
12 consider them for the merits. I will only consider them as  
13 background information. It will not weigh on the decision  
14 as to whether or not this program is lawful or unlawful.

02:56:32 15 All right. Exhibits 4 through 7, which I  
16 think get more into what the intervenors were talking about  
17 that as the -- I didn't hear the expert objection primarily  
18 from the government; is that correct? You were mostly on  
19 the timing?

02:56:45 20 MS. FUDIM: We do not object on the basis of  
21 the expert rule.

22 THE COURT: Okay. Okay. I have heard what the  
23 State of Texas has to say, and I heard your original  
24 argument. Is there anything based on what you heard from  
02:56:54 25 the State of Texas on Exhibits 4 through 7 that you would

1 like to bring to my attention?

2 MS. RIVAS: Yes, Your Honor. We would just  
3 reiterate that, again, it is not about whether or not these  
4 employees can testify as to the cost of the agencies for  
02:57:09 5 which they're employed. It is about the unfounded  
6 projections that they make using that.

7 And so, for instance, for the Terry and  
8 Lopez declarations, they get data from the federal  
9 government about unaccompanied children, and so we're not  
02:57:24 10 contesting that they may have the ability to testify as to  
11 the costs educating children, but they're extrapolating  
12 from this federal government data in order to make a  
13 projection, A, that is not relevant to this case because it  
14 is about unaccompanied children; but B, they don't share  
02:57:41 15 anything that lays a foundation for them to be able to  
16 reliably testify to the fact that their projections about  
17 the costs coupled with the -- the characteristics of  
18 unaccompanied children are conclusions that would be in any  
19 way reliable. And so that is what we are objecting to.

02:58:04 20 Same with the other declarations. Again,  
21 as for their ability of the declarants to testify to the  
22 specific cost, is one thing. But they go far beyond that  
23 and that is really where our objection lies.

24 THE COURT: Right. I am going to overrule  
02:58:19 25 those objections. However, I would like the parties in the

1 argument, and in posttrial briefing to the extent -- I  
2 never try to tell you what to write to me -- but I would be  
3 interested to hear about that. This goes more towards the  
4 reliability or weight of it, as opposed to the  
02:58:38 5 admissibility of it.

6 So, I will overrule those. And those are  
7 admitted. So we have admitted 2 through 7 so far from the  
8 plaintiffs.

9 Then from 8 through 17, we have what I  
02:59:02 10 think are a category of documents that are the same or  
11 similar, dealing with the processing and travel  
12 authorization form; is that correct? What are those being  
13 offered for? I'm sorry, the memos on that? What are those  
14 being offered for?

02:59:19 15 MR. WALTERS: I'm sorry, which exhibits are  
16 those, Your Honor?

17 THE COURT: First off, do we -- does  
18 everybody -- do you agree that 8 through 17 are basically  
19 the same category or bucket of documents? It's the memos  
02:59:37 20 of processing Venezuelan nationals of --

21 MR. WALTERS: Yes, Your Honor. Yes, there  
22 is -- looks like those are all the muster reports.

23 THE COURT: Right.

24 MR. WALTERS: Yeah. I mean, I think that just  
02:59:51 25 goes to background information. This is not to the merits



1 either. This is to show what is going on with the program,  
2 how they were describing it, what they're saying in  
3 implementing the program. So just how the program is  
4 operating.

03:00:12 5 THE COURT: What is the date of the rollout of  
6 the program?

7 MS. FUDIM: I'm sorry, I didn't hear you.

8 THE COURT: What is the date of the rollout of  
9 the program?

03:00:21 10 MS. FUDIM: I think it is January 6 with  
11 respect to the three latter ones and October 22nd with  
12 respect to the Venezuelan, the original --

13 THE COURT: That one was around a little while  
14 longer, right?

03:00:33 15 So is Texas saying that they are not offering 8  
16 through 17 for merits?

17 MR. WALTERS: Yes, Your Honor.

18 THE COURT: All right. With that -- so -- but  
19 you still have -- I don't want to say for the -- the

03:00:48 20 principle -- principled argument that the DOJ wants to  
21 preserve the extra-record. Is there anything other than  
22 that about these documents that -- whether they're hearsay,  
23 reliability, anything other than I shouldn't consider  
24 extra-record evidence?

03:01:03 25 MS. FUDIM: No, I stand on the prior assertions

1 that I made.

2 THE COURT: Okay. All right. So, then, I will  
3 overrule those objections, and use them only for  
4 background, or other than merits-based considerations.

03:01:19 5 MS. FUDIM: I guess we would -- if I may?

6 THE COURT: Sure.

7 MS. FUDIM: I noted in the ICE Priorities  
8 transcript, which I may or may not have leafed through  
9 before coming here, that the Court made statements about  
03:01:32 10 the fact that the extent a party doesn't specifically call  
11 the Court's attention to a particular exhibit in its  
12 proposed findings of fact, conclusions of law, or post  
13 trial briefing, that the Court was not going to go on its  
14 own merry way to read documents that nobody relies on  
03:01:45 15 because then the Court may be surmising the relevance or  
16 applicability of certain documents that is different from  
17 what one party may have intended, and if one party doesn't  
18 point the Court to it.

19 So I would just ask for the same -- I  
03:01:57 20 guess a clarification as to whether the intent is the same  
21 here. I mean, as I noted before, plaintiffs -- none of  
22 their declarants referenced these documents. Their  
23 proposed findings of fact don't reference these documents,  
24 and their conclusions of law don't reference these  
03:02:08 25 documents.

1                   So to the extent these documents are not  
2 specifically addressed, and particular portions of these  
3 documents, right, because, you know, some of them are  
4 lengthier than others --

03:02:16   5                   THE COURT: Right.

6                   MS. FUDIM: -- that the Court is not separately  
7 going to dig around within them, so we have to preemptively  
8 address each.

9                   THE COURT: That is correct. And so it is not  
03:02:25 10 just APA trials. It's bench trials in general when there  
11 are kind of no objections and exhibits are admitted. I --  
12 particularly in this case, when there is not a proffering  
13 witness that I can hear explanation from, I might be  
14 misreading information that is in the document.

03:02:44 15                   And so if you don't rely on it, and you  
16 don't explain it, and I don't have the opportunity to ask  
17 questions on it, because it's not something that kind of  
18 came up either during tomorrow, or in the post trial  
19 briefing, then I am not going to look at it, and it is  
03:02:57 20 not -- it shouldn't make its way into the opinion unless  
21 it's something that I felt like was so obvious that I was  
22 able to make sense of it.

23                   But I am telling you, in general, it is  
24 not my job to read all of these pages. It is painful, for  
03:03:11 25 example, if somebody submits a, you know, 500-page

1 contract, and there is only one provision that matters in  
2 it, I am not going to read the whole 500 pages. You need  
3 to tell me what provision in that document matters.

4 And so if you are submitting evidence -- I

03:03:24

5 am just telling the plaintiffs right now, if you are  
6 submitting evidence, you need to tell me what it matters  
7 for, which I am kind of getting a little hint of now. But  
8 you saying background, that's not enough. I need to know  
9 what I am looking at here and why this matters in the --

03:03:39

10 in -- in helping me to prepare for the merits part. Okay?  
11 Is that sufficient?

12 MS. FUDIM: Yes. And we just want to be able  
13 to know, you know, if there is no reference to these  
14 documents tomorrow during argument, then we sort of don't  
15 have an opportunity to --

03:03:50

16 THE COURT: Right.

17 MS. FUDIM: -- address it. And we wouldn't  
18 want to have to address something for the first time in our  
19 post-trial brief. If we hear nothing about these documents  
20 tomorrow, I mean, it would be sort of guesswork to know  
21 what we should even be saying about them. So...

03:03:59

22 THE COURT: So, you know, I don't know that I  
23 went that far in the first case. I basically said that if  
24 they are going to show up -- quite frankly, the pretrial  
25 proposed findings of fact and conclusions of law are just

03:04:14

1 kind of helpful. They just kind of -- it is like

2 memorandum of law, just kind of helps prepare me.

3                   The arguments in the trial itself, and

4 more specifically what I get from you afterwards with

03:04:26 5 specific citations to the record, are where the rubber hits

6 the road for me. And so when those come in, what has

7 happened before is the parties ask for a certain amount of

8 time to submit their proposed findings of fact and

9 conclusions of law. And then a couple of weeks later, or

03:04:40 10 however much time later, to respond to what the other side

11 had submitted so that you had an opportunity to say, well,

12 wait a minute, that is not what that meant at all, so that

13 if something does shows up for the first time in the

14 proposed -- that is posttrial, you do have the opportunity

03:04:53 15 to rebut it and say that that's not what that meant at all.

16 So...

17                   MS. FUDIM: Understood.

18                   THE COURT: Okay. Does that -- do you have any

19 suggestion -- you know, like I said, these cases kind of

03:05:03 20 take on a life of their own.

21                   Does that sufficiently protect your

22 interests?

23                   MS. FUDIM: I think as long as it's sequential

24 briefing and we have that opportunity to address it and it

03:05:11 25 is not cross briefing. I mean, we --

1 THE COURT: No. I am not --

2 MS. FUDIM: What I suspect is going to  
3 happen -- and maybe I'll be proven wrong -- but what I  
4 suspect is going to happen is that there's not going to be  
03:05:22 5 any discussion of these documents tomorrow. Or maybe now  
6 there will be because I've said that today. But I suspect  
7 that had I not said that, this wasn't going to be pointed  
8 to and that we wouldn't have seen it reappear later on.

9 And so it was just sort of going to exist  
03:05:33 10 in this amorphous otherworld background that the Court  
11 could go scurry off and read and draw conclusion about  
12 without any participation by the parties, and, you know, we  
13 don't want that.

14 THE COURT: You think I don't have a life,  
03:05:44 15 don't you?

16 So I -- I insist on having the principal  
17 findings of fact and conclusions of law, and then sometime  
18 later, agreed on by the parties, that you have the  
19 opportunity to rebut what you just saw in the principal so  
03:05:57 20 that you can say, "That is not what that meant. That  
21 evidence didn't say that. And that's misconstruing it.  
22 That's misunderstanding it."

23 And so it is sequential, I guess, was --  
24 which was not the word that I would use, but it is the way  
03:06:08 25 that I would like it to be.

1 MS. FUDIM: Understood. Thank you. I think  
2 that's fine.

3 THE COURT: Okay. Where did we leave off? So  
4 now we're at Exhibit 19.

03:06:24 5 I'm not sure whether or not we have  
6 buckets that we can put them into, since I am not as  
7 familiar with your exhibits.

8 I will also say that, in general, for  
9 exhibits, I try not to look at those ahead of time in bench  
03:06:37 10 trials, so that I am not drawing inferences or conclusions  
11 without your ability to present them the way that you -- it  
12 is like a jury, right? The jury doesn't see it until the  
13 trial starts. And so the exhibits, I haven't dove into.  
14 And I would expect you to direct me to whatever it is so  
03:06:52 15 that I don't get an idea in my head that is wrong.

16 So I will say, I pulled the ones necessary  
17 to prepare for the objections, but that is all I was  
18 looking at them for.

19 So looking at Exhibits 19 and that follow  
03:07:07 20 that, is that a stand-alone or is that...

21 MR. WALTERS: Your Honor, I would say 19  
22 through 28 are all of a piece, and that is all background  
23 sort of information.

24 THE COURT: Let me look at these.

03:07:28 25 MR. WALTERS: These are guides as to how the

1 online processes are to take place; talking about the  
2 background of the Uniting for Ukraine program, which is  
3 sort of the predecessor program.

03:07:44 4 THE COURT: So if this is going to talk about  
5 the application process for this program, then that is not  
6 background, is it? That's the program.

7 MR. WALTERS: Well, it's --

8 THE COURT: I mean, is this going to the  
9 exceeds the agency's authority? Or are we talking about  
03:08:05 10 contrary to law? What are we talking about with them?

11 MR. WALTERS: I mean, I don't think any of  
12 these documents are being used for any of those sorts of  
13 merits arguments. These are just to show, like, this is  
14 what -- you know, this is just helpful to the Court to  
03:08:17 15 understand, like, how this program works, like, what are  
16 they doing? What are the processes? It is not to show  
17 that they're exceeding their parole authority from these  
18 particular documents.

19 THE COURT: So some of these are basically  
03:08:50 20 training DHS employees on how to roll out the program?

21 MR. WALTERS: Yes, Your Honor.

22 MS. FUDIM: I'm not sure I universally agree  
23 with that characterization.

24 THE COURT: So 19 and 20 look that way.

03:09:16 25 MS. FUDIM: Well, 19 is with respect to Uniting



1 for Ukraine.

2 THE COURT: Oh, okay. That's the PowerPoint.

3 Well, it says, "/CHNV," which is why I  
4 thought that it had something to do -- says "Uniting for  
03:09:35 5 Ukraine/CHNV."

6 MS. FUDIM: Yeah. It is talking about the  
7 background of Uniting for Ukraine. And then -- it's  
8 predominantly geared towards United for Ukraine, and then  
9 it talks a little about the Venezuelan program, I believe,  
03:09:50 10 thereafter.

11 But, I mean, it is not -- it's not  
12 background. And, I mean, I think that that also goes to --  
13 like, we're still talking if he is saying background, that  
14 that goes to, does it get out of the record rule exception?  
03:10:02 15 But, I mean, we're also making, you know, 402 objections  
16 here with respect to the United for Ukraine piece, because  
17 that's obviously not relevant. And with respect to some of  
18 these others, you know, we are talking about -- and if we  
19 want to go one by one, that's fine.

03:10:15 20 THE COURT: Let's do that.

21 MS. FUDIM: Okay.

22 THE COURT: Let's do that.

23 So 19, I understand -- I am not really  
24 sure what the relevance of the Ukraine piece is, unless it  
03:10:24 25 is being shown that this is just phase two of the Ukraine

1 program by creating the CHNV. But I do see CHNV in this  
2 PowerPoint presentation.

3 So what are you offering 19 for?

4 MR. WALTERS: Your Honor, it is -- the CHNV  
03:10:38 5 program was based on the Uniting for Ukraine program. So  
6 it's just giving context, background information, as to,  
7 you know, how this program arose. You know, this is --  
8 it's relevant that way.

9 I mean, I think it's -- you know, the  
03:10:55 10 relevance of the Uniting for Ukraine program is shown by  
11 the fact that the intervenors have raised the issue of the  
12 vulnerability of the Uniting for Ukraine program. We have  
13 an amicus brief by people who are beneficiaries of the  
14 Uniting for Ukraine program, saying that they think if -- a  
03:11:11 15 ruling in the States' favor would jeopardize that program.

16 THE COURT: Has the Uniting for Ukraine program  
17 been the subject of litigation?

18 MR. WALTERS: I don't believe so, Your Honor.

19 THE COURT: Why not, if it is the same  
03:11:25 20 exceeding authority?

21 MR. WALTERS: I can't say, Your Honor.

22 THE COURT: Why isn't Texas doing it?

23 MR. WALTERS: Texas is very busy, as you know,  
24 with a lot of cases challenging immigration policies.

03:11:35 25 You know, one thing I would say is, you

1 know, we don't have to challenge everything, right? We  
2 create precedent. And if -- if the precedent we create  
3 would -- would -- would show later that that program is  
4 also unlawful for the same reasons, we don't have to  
03:11:50 5 actually file litigation, right?

6                   Like, the NAACP did not have to file  
7 lawsuits against every segregated school district. They  
8 were able to select certain ones, and then through the  
9 operation of the Anglo-American system of precedent, it  
03:12:04 10 takes care of itself. You don't have to sue --

11                   THE COURT: Why did you pick these four  
12 countries instead of Ukraine, if the Ukraine program was  
13 rolled out first?

14                   MR. WALTERS: Well, I can't say how this  
03:12:11 15 decision was made. One thing I would say, United for  
16 Ukraine obviously is a little different circumstance  
17 because it the involves -- the United States is at least  
18 tangentially involved in a war, a foreign war, between  
19 Russia and Ukraine. And so I think it -- you know, it  
03:12:26 20 might be a different, you know, political calculation.

21                   It might be a different policy  
22 justification for it that means, even though people might  
23 find that it has legal problems, right, the State of Texas  
24 is not required to be the policeman of everything that the  
03:12:40 25 federal government does.

1                   We are selective, and there may be a  
2 variety of circumstances that mean that that program is  
3 different in kind than this sort of program.

03:12:57 4                   THE COURT: All right. I will overrule the  
5 objection to Exhibit 19.

6                   MS. FUDIM: Can I just make one comment on  
7 that, and --

8                   THE COURT: Yes.

03:13:05 9                   MS. FUDIM: -- I'm not arguing with your  
10 ruling, but I just want to express the fact that I don't  
11 think that just saying a document deals with CHNV, so it is  
12 a background document, to get out of the extra-record --  
13 extra-record evidence rule is like -- that that's saying  
14 the word "background" should now be this magic word --

03:13:21 15                  THE COURT: Right.

16                  MS. FUDIM: -- because everything -- I mean,  
17 obviously, you know, he -- my colleague -- my adversary  
18 said, "Well, it just talks -- it speaks to, you know, why  
19 the program was implemented."

03:13:33 20                  But why the program was implemented is  
21 what goes into a record; you know, what was the agency  
22 looking at at the time that it made the decision it made?  
23 And when you evaluate whether a decision is arbitrary and  
24 capricious, it is based on what was the agency looking at.

03:13:46 25                  So when counsel says, "Well, it just goes

1 to background because it mentions CHNV," I have a concern  
2 that any document that pertains to CHNV, one could then  
3 say, well, it goes to background.

4                   And I think there has to be a limiting  
03:14:01 5 principle there. And I say this not in any -- I understand  
6 the Court just ruled on this, and I don't mean to be  
7 argumentative, but I think -- I can imagine where we might  
8 hear this again in the coming minutes as we go through  
9 document by document.

10                   And so, one, my point is I don't think  
03:14:10 11 merely saying "background" opens up the doors to anything  
12 dealing with the program, if it mentions CHNV's as  
13 background.

14                   And, two, I think that, you know, to the  
03:14:20 15 extent that counsel said that the relevance of this is it  
16 goes to, like, what the agencies were thinking about when  
17 they implemented the program, and that's precisely what the  
18 record is supposed to be, what were the agencies looking at  
19 when they implemented the program?

20                   THE COURT: What about final agency action?  
03:14:34 21 What about going outside the record to determine whether or  
22 not something is final agency action?

23                   MS. FUDIM: Well, I mean, I think that there  
24 could be a subset of documents that goes to whether or not  
03:14:46 25 something has been applied in a binding way or whether or

1 not it's being -- how it is being implemented. There could  
2 be certain subsets of documents, but I don't think that  
3 these particular documents -- I haven't heard how these  
4 documents go to whether or not it's final agency action,  
03:15:08 5 and I haven't heard counsel suggest that there is an  
6 exception there. I just keep hearing, well, it is  
7 background and --

8 THE COURT: What about whether or not it would  
9 have come in had there been a notice and comment period? I  
03:15:19 10 haven't really dealt with discovery issues that deal with  
11 notice and comment in particular.

12 MS. FUDIM: You mean as to --

13 THE COURT: If there are things outside the  
14 administrative record that the plaintiff is arguing would  
03:15:32 15 have come in had there been a notice and comment, they  
16 didn't have the opportunity to put it in, whatever.

17 MS. FUDIM: Yeah, but I don't think that with  
18 respect to these documents, which were all post-date --  
19 post-date.

03:15:42 20 THE COURT: Right.

21 MS. FUDIM: I mean, yes, if there was a  
22 document that -- or a -- an area of consideration that they  
23 would have argued THE notice and comment, like we would  
24 have put this in if we had been given the opportunity, but  
03:15:53 25 there was no notice and comment, you would assume that

1 those would be documents that existed at the time.

2 THE COURT: And I am not suggesting these are  
3 those documents. It's just something that dawned on me,  
4 that I meant to ask the parties about, is because of the  
03:16:03 5 separate cause of action.

6 The buckets of documents or discovery that  
7 come in, evidence that comes in under ultra vires, that  
8 come in under one of the exceptions to the record rule and  
9 then come in, and I haven't had to deal with it in the  
03:16:16 10 notice and comment period context.

11 For example, if this was only a notice and  
12 comment case exclusively, what are the exceptions, and are  
13 there any exceptions to the record rule that the plaintiff  
14 would say, you know, this would have come in; it could have  
03:16:32 15 impacted the decision?

16 MS. FUDIM: I mean, I think that there could in  
17 theory be such documents. I know that in this -- this  
18 Court has talked about in the *Texas v. United States* case,  
19 that plaintiffs identified mandatory language in the  
03:16:49 20 challenge processes that inconsistent with the  
21 discretionary language in those procedures, and so the  
22 Court had allowed in some documents.

23 THE COURT: That goes into the final agency  
24 action. I am talking about the separate, the notice and  
03:17:00 25 comment part. So...

1 MS. FUDIM: I mean, I think, yes, there  
2 could hypothetically be documents. I mean, I don't want to  
3 bind myself because that's not what I'm talking about here,  
4 so it's kind of a hypothetical --

03:17:10 5 THE COURT: I know. I just wanted you to go,  
6 "No, Judge, that's been decided by such and such case.  
7 That's complete," or whatever. I just didn't know if  
8 you --

9 MS. FUDIM: I don't know if there is. I mean,  
03:17:18 10 I don't know if Mr. Ward knows that. I mean, I can't stand  
11 here and say that's been decided by such and such case.

12 What I can say is that it doesn't seem to  
13 apply here. So -- you know, and I haven't heard plaintiffs  
14 say that. And I would think to the extent that it applies,  
03:17:30 15 it would pertain to bodies of documents or information  
16 which existed at the time that the processes were  
17 promulgated, which doesn't apply to any of these documents.

18 Yeah. I mean -- and I guess this is a  
19 point -- Mr. Ward's reminding me -- that I earlier  
03:17:52 20 mentioned to the Court, that to the extent that the Court  
21 is looking at how -- whether or not the policies are  
22 binding and how it has actually been affected --  
23 implemented, you can look to the actual data. I mean, the  
24 data is the first tier of -- that -- that -- that is the  
03:18:09 25 information. What are the numbers? How many people have



1 applied? Who has shown up at airports? Are there people  
2 who have been rejected by customs and border protection OFO  
3 officers at airports? What are those numbers?

4 I mean, all this data is going to be  
03:18:22 5 before the Court, so the Court can look to the data in  
6 terms of implementation.

7 THE COURT: All right. Go back to the State of  
8 Texas.

9 So for 19 and 20, what else -- what else  
03:18:39 10 do we have going on?

11 MR. WALTERS: 19 and -- 19 and 21 and I believe  
12 22, they talk about the requirements for financial  
13 sponsors. And, you know, that goes to our claim that it is  
14 contrary to law in circumventing other immigration  
03:18:57 15 processes. We have -- that's another -- have a lot of  
16 these forms about these other programs, too, that talks  
17 about requirements.

18 So, you know, one of our arguments is --  
19 and there is case law saying that Congress can't use its  
03:19:10 20 parole authority to circumvent other lawful channels of  
21 immigration that Congress has put requirements and  
22 limitations on, including numerical limitations.

23 And so that -- the requirements for  
24 financial sponsors and a comparison of that with these  
03:19:31 25 other immigration programs, visa programs and the like,

1 that all goes to that argument that they are -- that they  
2 are acting contrary to law in treating the parole authority  
3 as a way to substitute for Congress's limitations in other  
4 immigration processes.

03:19:50 5 And, you know, one thing, Your Honor, I  
6 would like to say. So, you know, we've talked about final  
7 agency action in the Fifth Circuit. Final agency action is  
8 a matter of subject matter jurisdiction, just like  
9 standing. So the same -- in the Fifth Circuit, final  
03:20:04 10 agency action is a matter of subject matter jurisdiction,  
11 just like Article III standing, so it is treated the same  
12 way for purposes of the record rule.

13 So any of these documents -- and this is  
14 why I think, you know, it is just premature to knock out  
03:20:17 15 any documents when things could happen at trial, things  
16 could happen in post-trial briefing where certain documents  
17 might be used for one purpose or another, and knocking them  
18 out preemptively seems unwise when it's all about how the  
19 document is being used. There is nothing inherent in any  
03:20:35 20 particular document that it makes it illicit. It is how  
21 the document is being used.

22 And that is something that is going to be  
23 happening throughout this process, and the Court has the  
24 final determination as to how it is going to use -- as the  
03:20:50 25 finder of fact, how it is going to use any particular

1 document.

2 THE COURT: So -- but tomorrow you intend on  
3 resting without presenting any witnesses, and the exhibits  
4 will either be in or out at that point.

03:21:01 5 And so what's going to change between what  
6 you can tell me about these documents now and between when  
7 you rest tomorrow?

8 MR. WALTERS: Well, I guess -- I can't  
9 necessarily know unless, you -- we know what the other side  
03:21:16 10 is going to say as well. I mean, it is always possible  
11 that something that is in here will be used to rebut some  
12 point made by another party.

13 THE COURT: Well, I mean, I guess, you -- it  
14 could go back to you for rebuttal. But tomorrow, as I  
03:21:34 15 understand it, only the intervenors are going to make an  
16 opening. And then we are going to go to you, and you're  
17 immediately going to rest, based on your record that's  
18 admitted at that point. And then we are going to the DOJ.  
19 And so at that point, your record is closed except for  
03:21:50 20 rebuttal evidence.

21 So what are you going to learn between now  
22 and the intervenors' opening statement that is going to  
23 change what you would be using from an evidentiary  
24 standpoint?

03:22:00 25 MR. WALTERS: Well, I don't think anything,

1 Your Honor. I think that, you know, we -- we want to admit  
2 our exhibits into evidence that we have --

3 THE COURT: Right.

4 MR. WALTERS: -- that we have designated. And,  
03:22:13 5 you know, I don't think anything will necessarily change.  
6 We -- we want these to be part of the trial record. And,  
7 you know, we anticipate using most of them. Maybe not all  
8 of them will be used tomorrow.

9 THE COURT: Yeah. But, I mean, there has to  
03:22:29 10 be -- assuming the record rule applies because of the ultra  
11 vires deal, I am happy to find out the answer to that. But  
12 assuming the record rule applies, they can't just come in.  
13 You have to point to an exception to it, right, because the  
14 rest of your claims are APA claims.

03:22:42 15 So I'm trying to figure out what are your  
16 exceptions to this category of documents, other than you  
17 want them in?

18 MR. WALTERS: Well, they show the  
19 implementation.

03:22:56 20 So these documents that are training to  
21 internal personnel, it goes into how they're -- how these  
22 requirements are being implemented. And they -- you know,  
23 our contrary to law claim, in order to say something is  
24 contrary to law, you have to -- you can look at other laws,  
03:23:14 25 right?

1                   So other immigration laws, the forms that  
2 are used in order to show that this is unlawful  
3 circumvention of that law for the contrary to law claim.

4                   Obviously, the record rule is most  
03:23:27 5 intensely in the arbitrary and capricious. Like, what did  
6 the agency have before to consider when it is engaging in  
7 its rationale for action?

8                   But when you're looking at if something is  
9 contrary to law because of its interaction with other laws,  
03:23:43 10 you obviously have to look at that.

11                   THE COURT: So --

12                   MR. WALTERS: You have to look at those other  
13 laws and how those requirements might be evidence of  
14 unlawful circumvention, which the Fifth Circuit has said is  
03:23:54 15 not a permitted use of the parole authority.

16                   THE COURT: Tell you what, we have been going  
17 at this for a little bit. It's 3:20. Why don't we take a  
18 few minutes of a break. Start back up at maybe 3:40.

19                   MR. WALTERS: Yes, Your Honor.

03:24:06 20                   THE COURT: Does that work for everybody?

21                   COURT SECURITY OFFICER: All rise.

22 (Proceedings recessed from 3:24 to 3:44.)

23                   THE COURT: Please be seated.

24                   All right. Back on the record.

03:44:52 25                   Before we, I guess, keep going, there was

1 a particular category of documents, which was the reason  
2 why I wanted to take a break, and also because we had been  
3 going for two hours, that in dealing with the APA rule, one  
4 of the things is, is that there is an ultra vires claim at  
03:45:11 5 this point. And so to the extent that that is a cognizable  
6 claim, that they would be admissible for that purpose as  
7 well. And so -- but I don't know the answer to that,  
8 whether or not the ultra vires claims exists.

9 I have seen your -- this case, and I'll be  
03:45:25 10 interested to see the briefing on that. And I know that  
11 the parties have talked about whether or not that is a  
12 cognizable claim. If there is a cognizable ultra vires  
13 claim, then we're not talking about record rule exceptions;  
14 and it could come in for that.

03:45:39 15 So to the extent that those things would  
16 be limited for the APA claim, to the extent that there is  
17 a -- an ultra vires claim, then there are no limitations.  
18 But I wanted to, I guess, get the response predominantly  
19 from the defense on that particular issue.

03:45:55 20 And I haven't made a determination. Quite  
21 frankly, like I said, I had never seen the *Reich* case. You  
22 still haven't had a chance to read it. But, just  
23 generally, if there is an independent ultra vires claim,  
24 then we are not talking about record rule limitations at  
03:46:11 25 all?

1 MS. FUDIM: I guess if there is an ultra vires  
2 claim, if something is separate and apart, then I guess you  
3 are not talking about record rule. But, I mean, I guess  
4 it --

03:46:21 5 THE COURT: We still have the other relevance  
6 and all that stuff.

7 MS. FUDIM: But then it also brings me to a  
8 question that I don't have an answer; so it is just me  
9 talking.

03:46:28 10 But if there is no record -- if we have an  
11 ultra vires claim, then there is no record rule. But do  
12 you also get to have an APA claim? Because presumably  
13 there's documents subsumed within the record which would  
14 otherwise be inadmissible but for the fact that they are  
03:46:44 15 part of the record in the case. You know, there very well  
16 may be documents that are inadmissible for other  
17 evidentiary reasons, that shouldn't then be considered with  
18 respect to the ultra vires claim.

19 For example, hearsay documents could be a  
03:46:55 20 part of the record, if they are documents that the agency  
21 considered in coming to its conclusion. But those  
22 documents would still then be inadmissible, presumably,  
23 with respect to a claim that's not a record claim.

24 THE COURT: So you are saying a hearsay  
03:47:09 25 document that was within the record, that would come in

1 under the APA claim, could not be considered for the ultra  
2 vires claim because the administrative record doesn't  
3 automatically come in that way?

03:47:21 4 MS. FUDIM: I mean, I haven't looked at this,  
5 right? So I don't want to say it with the authority of I  
6 have researched it. That's why I say it's just me thinking  
7 aloud.

03:47:32 8 But if you have a claim that doesn't come  
9 automatically with a record, it is just a claim like any  
10 other claim would be, then presumably the Federal Rules of  
11 Evidence would apply to the admissibility of any document  
12 to be considered as part of that claim; which would mean  
13 that hearsay would apply; which would mean that to the  
14 extent there is hearsay documents in the record, that those  
03:47:46 15 documents would then not be admissible for that claim.

16 So I think you just wade into difficult  
17 waters, where you try to parse and allow to coexist these  
18 two different claims which really get at the same unlawful  
19 activity.

03:47:58 20 THE COURT: Right.

21 MS. FUDIM: I know that my colleague has taken  
22 a very quick look at the case that plaintiffs' counsel had  
23 mentioned; and he did so while we were sill sitting in the  
24 courtroom, so that's not with the kind of focus we would  
03:48:10 25 want to typically look at something. But I know he



1 mentioned that in that case there wasn't really a question  
2 of are we going to be litigating this under the APA,  
3 because it pertained to conduct directed at the president,  
4 I believe he said. And so, I mean, we would want to  
03:48:20 5 respond to it and read the case more closely, not while  
6 proceedings are going on.

7 But I just think that there is a real  
8 problem when you have two claims that track the same  
9 alleged violation but come with different admissibility  
03:48:33 10 factors. And you have Congress trying to claim channel  
11 claims of a certain type that look like a duck and quack  
12 like a duck into a certain column. But now there is this  
13 other outlet as well which would get around the record  
14 rule. I just think that that presents practical as well as  
03:48:49 15 legal problems.

16 THE COURT: Right. So one of the string cites  
17 that this case cites is a 1979 case, and the string -- the  
18 parenthetical after it says that it's a nonstatutory review  
19 of whether an agency exceeded its delegated authority.

03:49:03 20 And, you know, the implication is that it is an ultra vires  
21 claim. Anyway, those are all things, I guess we will need  
22 to take a look at.

23 Obviously, it is not dealing with  
24 discovery, but if it is an ultra vires claim, then we have  
03:49:17 25 to -- then that does take a record rule out of play for

1 those particular instances.

2                   The reason why I wanted to take the break  
3 in particular was, in the Priorities case, there was the  
4 allegation that an ostensibly discretionary memo,  
5 promulgated by the agency, was actually mandatory in the --  
6 in effect. And so the way that they were able to show that  
7 was, and the reason why I let some information in, was is  
8 that there were documents that postdate the memo that show,  
9 well, but it looks like maybe their hands were tied a

10 little bit.

11                   And so we got to this, which are these  
12 documents that are starting to postdate the January 6th  
13 rollout date and their training. And so I know that some  
14 of the allegations that we have had in this case is whether  
15 or not, you know, it -- this has to be a case-by-case  
16 analysis. It has to be a discretionary review.

17                   And so, it's helpful for me to be able to  
18 see, well, does it -- were they being trained like it is  
19 discretionary? Or is it really acting -- is it actually  
20 more mandatory in nature? So that was the reason why we  
21 started hitting these documents -- this category of  
22 documents that postdated because it is hard for that to be  
23 background.

24                   So they can call it background, but that  
25 is the reason why I am interested. So I would be

1 interested to know what the defendants' thoughts are on,  
2 okay, the program says it's discretionary case-by-case, you  
3 always retain your individual authority, but as in the  
4 Priorities case, the way it -- the way it was actually  
03:50:51 5 implemented or the way it was trained, in practicality or  
6 in effect it really wasn't as discretionary as it seemed to  
7 be.

8 So --

9 MS. FUDIM: I would respond that in the first  
03:51:00 10 instance that if the Court was looking to see, you know,  
11 and I can't compare it -- you know, I don't have the same  
12 level of familiarity with the Priorities case as the Court  
13 does, but here we have the first line data. I mean, we  
14 have the actual numbers.

03:51:13 15 THE COURT: Well, but, I mean, is it -- that  
16 data doesn't tell me how those decisions were being made.

17 MS. FUDIM: It may not tell you how those  
18 decisions were being made, but we know that -- and you will  
19 hear -- you will hear this tomorrow, that there were  
03:51:27 20 individuals whose received advance travel authorization to  
21 come to the United States, and then when they arrived at an  
22 interior airport were denied parole under the CHNV  
23 processes.

24 THE COURT: Right.

03:51:39 25 MS. FUDIM: So clearly it -- there is still

1 some discretion involved. And when you look at these  
2 documents, and I haven't memorized them number for number,  
3 but I know when I looked through them, a number of these  
4 training materials were not just about like how to  
03:51:52 5 implement the program, but, you know, what to do if you put  
6 down an e-mail address incorrectly. Like how do you fix  
7 that in the system?

8                       Ways to find, you know, duplicate cases,  
9 how to modify a beneficiary's passport country in ELIS,  
03:52:08 10 which is the program system. So a lot of this had to do  
11 with not like how to make these decisions, but how do you  
12 use the software, and if you make a mistake, how do you fix  
13 it in the software?

14                       And just to circle back to something that  
03:52:20 15 plaintiffs' counsel mentioned, which was, you know, we want  
16 to be able to refer to other programs and other laws, I  
17 mean, if plaintiffs wants -- if plaintiffs want to refer to  
18 other laws, laws would seem to be the kind of thing that  
19 the Court should take judicial notice of.

03:52:35 20                       So if plaintiff wants to point to other  
21 laws that exist and make arguments with respect thereto, I  
22 mean, go ahead, but these are not laws. None of these  
23 documents that we have here are laws. I think where he is  
24 talking about other programs that pertain to Exhibits 30,  
03:52:48 25 31 and 32, not number 19 and 20, which we have been talking

1 about.

2 THE COURT: Right. I kind of want to go  
3 through these now that -- with that background. What I  
4 wanted to do is get your response to the reason why I was  
03:52:59 5 interested in them, which was how was the program actually  
6 being implemented? Ostensibly discretionary, case-by-case  
7 or is it more mandatory in nature? And the answer may be,  
8 no, it is absolutely discretionary. But this kind of shows  
9 me that. And that goes to what the mandatory -- doesn't  
03:53:13 10 that go to one of the exceptions that -- you know, whether  
11 or not it's mandatory?

12 MS. FUDIM: I think two things: One, if the  
13 question is couldn't training materials go to whether or  
14 not a program is being implemented in mandatory or  
03:53:28 15 discretionary --

16 THE COURT: Right.

17 MS. FUDIM: -- manner, my answer is yes. If my  
18 question is, do these documents do that? My answer would  
19 be no. None of these documents do that.

03:53:35 20 THE COURT: Yeah, but I mean, that's -- that is  
21 your argument to me about the exhibit that -- you know,  
22 that's what I am saying. If someone says to me that, you  
23 know, a picture of a dollar bill goes to whether or not  
24 this is discretionary or mandatory, I am going to go, no,  
03:53:49 25 that has nothing to do with it. These look like they're

1 training and they could arguably go to it, and I may say,  
2 well, that doesn't persuade me because nothing in there  
3 makes me think it is mandatory, but it goes to the issue.

03:54:00 4 MS. FUDIM: Right. But I think that, you know,  
5 with respect to these, that's why we have the 402 objection  
6 because I think you would have to have a witness first come  
7 and say these go to -- what are these? Why -- you know,  
8 how are they being used? What do they mean?

03:54:14 9 And absent a witness, I mean, I just think  
10 that there's improper foundation for those -- for those  
11 conclusions to be drawn. And I think with respect to a  
12 number of these trainings, there is no connection, or nexus  
13 between how they're actually being implemented.

03:54:30 14 I mean, when you look at the one -- and I  
15 forget the number -- but I know one of them had to do with  
16 how to fix an e-mail address if you write it wrong.

17 THE COURT: Right. So I am less interested in  
18 that.

03:54:38 19 MS. FUDIM: Right. And they're mixed in. So,  
20 I mean, I don't think that we can just say that because  
21 they're training, ipso facto they come in under this  
22 exception.

03:54:49 23 THE COURT: Right. I am not going to do what  
24 we did with the -- like the 2 and 3, you know, and kind of  
25 put these in buckets. I think it makes more sense to go

1 through these kind of one by one to decide whether or not  
2 there is something that is -- that would apply.

3                   Okay. So for 19, I will -- all right. So  
4 let me just ask the State of Texas. What are you -- let's  
03:55:08 5 talk about 19. What are you offering?

6                   I mean, we have got, I guess, basically  
7 just 21 or 20 exhibits to go through, so let's just go  
8 through them. I think it is more thoughtful to do it that  
9 way.

03:55:24 10                  MR. WALTERS: 19 talks about the requirements  
11 for financial sponsors, and we say that that shows that the  
12 program is contrary to law.

13                  MS. FUDIM: We would just respond that the  
14 actual processes speak to the requirements for financial  
03:55:40 15 sponsors. I mean, that is in the processes themselves.

16                  THE COURT: So I will overrule the objection  
17 and allow it to come in for this -- just let me -- to the  
18 extent there is not an ultra vires claim, any consideration  
19 of the evidence would not -- would only go to standing,  
03:55:54 20 remedy, and one of the exceptions to the APA rule, and  
21 whether -- and it would be incumbent on the offering party  
22 to point to me to what they think that is, if they want me  
23 to do something other than standing or remedy.

24                  So that's why I am looking at you, Texas.  
03:56:09 25 So -- so, for example, if you want to use 19 for something

1 on the merits, and you're saying that it goes to contrary  
2 to law, because of the reason that you just articulated,  
3 and you're not able to make that -- make that link, then it  
4 may be admitted, but it is not going to make its way into  
5 my findings of fact. All right?

03:56:31

6 So Number 20. This to me looks like it's,  
7 you know, how to -- it's training on how to fill out the  
8 application. Is that what that is?

9 MR. WALTERS: Yes, Your Honor. These are for  
10 reviewers of applications, training.

03:57:01

11 THE COURT: So which application are we talking  
12 about? This is the initial application that is made by the  
13 person, for example, in their home country?

14 MR. WALTERS: I believe that's --

03:57:18

15 THE COURT: Online?

16 MR. WALTERS: I believe that is right, Your  
17 Honor, yes.

18 MS. FUDIM: I believe that this is the -- this  
19 pertains to CI -- USCIS's review with respect to financial  
20 sponsors, whether or not someone is not sponsored.

03:57:34

21 Support.

22 THE COURT: Because I am seeing a poverty  
23 guideline on the last page.

24 MS. FUDIM: Yeah. So CIS is the component that  
25 looks at the first step of this process, which has to do

03:57:43



1 with -- I'm sorry. I'm sitting.

2 THE COURT: That is okay. Y'all can keep your  
3 seats, okay?

4 MS. FUDIM: Thank you.

03:57:48 5 THE COURT: We are going to be going through a  
6 lot of documents. Go ahead.

7 MS. FUDIM: That has to do with spons- --  
8 supporters, rather. But, this is not how they should make  
9 any decisions. This is how they use the computer software.

03:57:59 10 THE COURT: So what are we showing with  
11 Number 20?

12 MR. SUAREZ: Again, to the background, and to  
13 kind of help the Court, I think, to kind of streamline it,  
14 most of the exhibits, other than Exhibits 19, 21, and 30  
03:58:14 15 through 37, are -- we are offering for background purposes  
16 and that will be our record-rule exception.

17 For the exhibits that we name there, we go  
18 to what Mr. Walters just indicated, for Exhibit 19 with the  
19 anti-circumvention and showing the violation of law, and  
03:58:31 20 that's what those exhibits -- those exhibits would go to.  
21 But everything else would be background information for the  
22 Court, and help contextualize the implementation of  
23 the processes.

24 THE COURT: So you said that for 19, 20 and 21?

03:58:43 25 MR. SUAREZ: Sorry 19, 21 -- so not 20 -- and

1 then 30 through 37.

2 THE COURT: All right. So I am on 20.

3 MR. SUAREZ: Right. So 20 would be just more  
4 background information, and --

03:58:53 5 THE COURT: This is in March of 2023 --

6 MR. SUAREZ: Right.

7 THE COURT: -- two months after the program got  
8 rolled out.

9 MR. SUAREZ: So it would be kind of showing how  
03:59:01 10 UCIS -- USCIS, like, looks at reviews, and how they train  
11 the individuals to review these programs, or review the  
12 applications.

13 THE COURT: And what -- and you are just saying  
14 that that -- what is that going -- how is that going to  
03:59:16 15 help me?

16 MR. SUAREZ: Just to give you context in  
17 reviewing the -- the record as a whole.

18 THE COURT: All right. For the reasons I said  
19 earlier, I will let 20 in. It shows how the program is  
03:59:42 20 being trained, and the implementation of it. However, if  
21 it doesn't go to something that, you know, shows, for  
22 example, that it is mandatory, or is something other than  
23 that, it could go into something that -- you know, like for  
24 the background, I just don't know what kind of background  
04:00:00 25 we're talking about. This isn't background.

1 I guess it helps me understand how the  
2 people were doing their job doing the program, but this to  
3 me doesn't really go to whether or not it exceeds the scope  
4 of their authority, and whether or not it's mandatory.

04:00:14 5 So -- so 20 will be admitted for limited  
6 purpose.

7 So 21 is the Ukraine, Uniting for Ukraine,  
8 Venezuelan thing. Or what are --

9 MR. SUAREZ: Yes, Your Honor. It's the same  
04:00:37 10 basis as for -- articulated for 19, where this is kind of  
11 showing the anti-circumvention, and the arguments that it  
12 is contrary to law that are made.

13 THE COURT: All right. I will let it in for  
14 those bases.

04:00:51 15 All of this, of course, is subject to the  
16 fact that there is not -- assuming that there is not a  
17 separate ultra vires claim. So that kind of goes for all  
18 of these rulings because I'm not sure what I think about  
19 the ultra vires claim.

04:01:06 20 All right. 22. So is 22 like any of the  
21 other ones here? I guess it is not. Okay.

22 MR. SUAREZ: Yeah.

23 THE COURT: So what are we offering 22 for?

24 MR. SUAREZ: It would be the -- as far as,  
04:01:36 25 again, context to the implementation of the CHNV program,

1 and whether it is going to -- similar to the -- to 20,  
2 where they're viewing the mandatory, or whether it's  
3 mandatory, or discretionary, and reviewing the case.

4 But this, again, would be just contextual,  
04:02:02 5 similar to the other background arguments.

6 THE COURT: Ms. Fudim -- sorry. Ms. Fudim, did  
7 you have anything?

8 MS. FUDIM: The same objections I have had. I  
9 don't think the word "background" is the magic elixir which  
04:02:20 10 allows everything in. I am not going to reiterate  
11 everything I said --

12 THE COURT: Right.

13 MS. FUDIM: -- but same positions, Your Honor.

14 THE COURT: All right. So I'll overrule the  
04:02:33 15 objection. It will be admitted for the limited purpose,  
16 then. So when I say that, that means -- that means that it  
17 is not coming in for merits. And so when you tell me it is  
18 coming in for background, that means it is not coming if  
19 for merits.

04:02:48 20 It may help me, I guess, understand the  
21 program, which is helpful to me, and I would like to hear  
22 about that, but that means that it is not going to come  
23 into whether or not this is mandatory, contrary to law, or  
24 anything other than an Article III standing or remedy.

04:03:00 25 So what have we got for 23?

1 MR. SUAREZ: Similar basis, Your Honor, and we  
2 understand that it is not coming in for merits. It would  
3 be the same arguments raised as far as background  
4 information.

04:03:11 5 THE COURT: All right. So then let's go --  
6 because these do seem to be somewhat similar.

7 Yes, ma'am. I'm sorry.

8 MS. FUDIM: Sorry, I'm raising my hand like I  
9 am in --

04:03:20 10 THE COURT: You did.

11 MS. FUDIM: -- like I am in school.

12 Just for the record, I want to make one  
13 point, which is that the exception to the record, you know,  
14 that whole NEPA scientific complex case where it talks  
04:03:31 15 about background, I think that in those cases, there really  
16 is a merits piece to that because the Court is assessing  
17 whether or not the agency failed to live up to its  
18 statutory mandate to consider certain factors in coming to  
19 agency action with respect to the environment.

04:03:50 20 And so here what we're saying, well, it is  
21 coming in for background but for a non-merits purpose --

22 THE COURT: Right.

23 MS. FUDIM: -- I think there is some inherent  
24 contradiction there because if it is based on the exception

04:04:01 25 as it is written, I think that that exception is really

1 intended to aid the Court with a merits analysis on those  
2 NEPA claims.

3 THE COURT: Right. And so this may not seem as  
4 complex to you, but having read the process, particularly  
04:04:11 5 from what the intervenors had to see, is that this -- the  
6 intervenors that were in the 100-day-pause case were  
7 extraordinarily helpful in explaining to someone who is  
8 unfamiliar originally -- I'm very familiar with now -- but  
9 unfamiliar with immigration, the INA in general and how it  
04:04:29 10 is implemented.

11 But this program, and the intricacies of  
12 what happens with this, this is all very helpful for me to  
13 understand the program, quite frankly. And so I have had a  
14 NEPA case, and so I am familiar with all of that as well.

04:04:46 15 And I know that typically, some of the  
16 information that comes in that is outside of the record is  
17 if we are talking about, you know, chemistry, and, you  
18 know, things that deal with biological things and sea  
19 grasses and all that, I get all that. It is designed to  
04:05:03 20 explain to me so I understand what the terms that are in  
21 the administrative record means.

22 To me, this is more helpful so that I  
23 understand the process from the immigration kind of -- from  
24 the immigration implementation perspective. I understand  
04:05:18 25 that you don't like the catchall for it, but it is helpful

1 for me to have it.

2 So where were we at?

3 MR. SUAREZ: I believe we left off on -- I  
4 think we were starting 24, and, again --

04:05:32 5 MS. FUDIM: I think we missed 23.

6 MR. SUAREZ: Sorry, 23.

7 THE COURT: Yeah, I don't know that I've got --  
8 I don't have 23. Okay.

9 So I was going to try to figure out how  
04:05:39 10 many of these are going to be that, just explains the  
11 process, the nuts and bolts of how it goes to assist the  
12 Court in understanding it.

13 MR. SUAREZ: Correct.

14 THE COURT: How many of these in a row are that  
04:05:50 15 way, and then I want to hear from the defense and  
16 intervenors as to whether or not no, this is not actually  
17 part of what you just suggest?

18 MR. SUAREZ: So, it would be -- from where  
19 we're at, so Exhibit 23 through 29.

04:06:02 20 THE COURT: Okay. So I want to give the  
21 intervenors and the defendants a chance to take a look at  
22 those and see if those -- what you think about -- I know  
23 that you are not going to agree with the ruling, but if it  
24 is going to come in consistent with the ruling that I have  
04:06:18 25 made for explaining the process to me and informing the

1 Court on the technical nature of how this is being rolled  
2 out, but not being considered for merits.

3 MS. FUDIM: I mean, I just don't think that all  
4 these documents do that. I think a lot of these talk about  
04:06:32 5 how to use ELIS system, like how -- what field you do, when  
6 you hit the enter button, when you hit -- I mean, there is  
7 just a lot of that in here. But, I mean, again, we are not  
8 hiding from any of this --

9 THE COURT: I understand.

04:06:44 10 MS. FUDIM: -- and I don't think there is some  
11 smoking gun that we lose this case in these documents. But  
12 they're not really consequential, but I also don't think  
13 that they're particularly informative for the Court.

14 I don't know if intervenors have more to  
04:06:56 15 speak to on that.

16 THE COURT: Intervenors?

17 MS. RIVAS: We don't take any position on this,  
18 Your Honor, but we don't mean to interrupt the flow, but  
19 there were a few things that we wanted to make sure to get  
04:07:07 20 on the record, understanding that you have already admitted  
21 Exhibits 4 through 7.

22 THE COURT: Oh, yeah. If I start to move on,  
23 please chime in at any time. So if I am overlooking or you  
24 have something more to say, please let me know.

04:07:21 25 MS. RIVAS: Thank you, Your Honor.



1 We just wanted to note that these  
2 exhibits, 4 through 7, the declarations that you have  
3 admitted, in addition to having data that predates the CHNV  
4 program as federal defendants have explained in-depth, in  
04:07:36 5 addition to the fact that they talk about populations that  
6 are not the CHNV beneficiaries that are at issue in this  
7 case, Texas has failed to meets its burden to establish the  
8 net costs associated with the program, and to address that  
9 in any sort of meaningful way. And we just wanted to note  
04:07:52 10 for the record that Texas is on notice of this. This was  
11 ECF 177 --

12 THE COURT: Right.

13 MS. RIVAS: -- in that discussion, and we just  
14 wanted to put that on the record that this is a point that  
04:08:02 15 they haven't meaningfully engaged with, and so, insofar as  
16 federal defendants stipulate as to whether or not -- or the  
17 fact that Texas does, in fact, incur any kind of net, or  
18 gross cost, that's not something that the intervenor  
19 defendants are willing to stipulate to.

04:08:21 20 THE COURT: Right. So, recalling that you had  
21 said that their -- that they are required to produce net  
22 costs as opposed to gross costs, and I had said that Texas  
23 is now on notice that you will be making that argument, I  
24 also heard Mr. Walters say that he's familiar with some  
04:08:37 25 cases that I haven't read, that I am sure I am going to get

1 the chance to, that say that you don't have to have net  
2 costs versus gross costs.

3 But in that order that I sent, that I  
4 signed, plus what you have said here today, once again,  
04:08:50 5 when -- they are on notice that those documents -- that --  
6 whether or not it's gross costs, it's -- but net costs are  
7 required, then that's just something that would -- that  
8 would be determinative of whether or not they have met  
9 their injury.

04:09:06 10 So, you know, you will be able to make  
11 that argument. And I don't know that I have seen a net  
12 costs in the immigration context before, but certainly to  
13 the extent that it is there, I would be interested to know  
14 it. Whether or not that you have to have that, and that  
04:09:23 15 you don't get injury unless you establish it because, like  
16 I said, I went out of my way in the order to make sure that  
17 all the parties knew that that was something that you were  
18 going to be bringing up, and if they don't, then they  
19 didn't meet their burden.

04:09:36 20 MS. FUDIM: And just to be clear, we didn't --  
21 when I said we were speaking solely to two of the  
22 declarations, the Waltz and the Terry that the State has  
23 some costs for educating students and some costs for  
24 incarcerating people, that was -- you know, we're not  
04:09:48 25 talking about net cost, we're not talking about gross cost,

1 we're not waiving any argument there.

2 Just simply saying to the extent that  
3 these declarations are not admitted, we have no problem  
4 conceding that Texas incurs some sort of costs --

04:09:57 5 THE COURT: Costs.

6 MS. FUDIM: -- to educate people, Texas incurs  
7 some sort of cost to incarcerate people. We would not make  
8 the sudden argument with respect to driver's licenses, for  
9 example --

04:10:07 10 THE COURT: Right.

11 MS. FUDIM: -- because we think there was going  
12 to be an argument or a fight there.

13 THE COURT: All right. So, then -- go ahead.

14 MR. SUAREZ: So I think we can make this a  
04:10:15 15 little easier. We'll -- Texas will withdraw Exhibits 24  
16 through 27.

17 THE COURT: You said withdraw?

18 MR. SUAREZ: Withdraw, yes.

19 THE COURT: Okay.

04:10:22 20 MR. SUAREZ: As far as Exhibit 23, I think  
21 we -- our stance is that it does go to the merits because  
22 it is still going -- similar to the Exhibit 19, Exhibit 21,  
23 where it is going to the anti-circumvention, it's going to  
24 the vetting processes --

04:10:40 25 THE COURT: Right. The contrary to law part,

1 right?

2 MR. SUAREZ: Correct.

3 THE COURT: So consistent with the 19 and 21,  
4 which is to the extent that it complies with either Article  
04:10:49 5 III standing, remedy, or some other exception to the APA  
6 rule, including contrary to law, or mandatory versus  
7 discretion, whatever other exception might apply, it will  
8 be considered for that limited purpose.

9 So now we have withdrawn 24 through 27?

04:11:05 10 MR. SUAREZ: Correct.

11 THE COURT: I can't remember, what did we do  
12 with 28? Is that objected to?

13 MS. FUDIM: Yes. It is the same 402 objection  
14 as well as outside the record. It was 29 that we didn't  
04:11:18 15 object to.

16 THE COURT: 29?

17 All right. So you're offering 28?

18 MR. SUAREZ: Correct. And that goes to the  
19 same background argument that we have made in context,  
04:11:28 20 and --

21 THE COURT: Then what is 28?

22 MR. SUAREZ: I think it goes into the  
23 implementation and the review by USCIS employees and -- as  
24 far as closing cases, and how they review applications.

04:12:00 25 MS. FUDIM: Your Honor, if I may, when there

1 are duplicate applications, whether duplicate applications  
2 for supporters or duplicate applications whereas someone  
3 changes their name or they submit materials twice, so that  
4 there is two records for the same application, there is a  
5 process to administratively close one, so you are not  
6 adjudicating something twice. This is the process by which  
7 that happens. I -- we stand on our 402 objection.

04:12:16

8 THE COURT: Okay. All right. I will admit it  
9 for the limited purposes, then, consistent with -- it  
10 doesn't seem to me that this has a merits-based connotation  
11 at all, then. Well, I don't know. I guess it does if you  
12 are talking about how it is implemented. Or is it just  
13 supposed to inform me as to how the process works?

04:12:35

14 MR. SUAREZ: For 28?

04:12:48

15 THE COURT: For 28, correct.

16 MR. SUAREZ: For the -- how the process works,  
17 is the --

18 THE COURT: So you are not offering this for  
19 contrary to law or mandatory discretion, any of that?

04:12:58

20 MR. SUAREZ: No.

21 THE COURT: So 28 will be considered just for  
22 informational, as to how the -- background as to how the  
23 immigration process works.

24 29 is already -- there is no objections,

04:13:11

25 is that correct, to 29, from anyone?

1 So 29 is admitted without objection.

2 Now we are to 30.

3 MR. SUAREZ: Correct. And this would be our  
4 contrary-to-law argument, the reason why it should go to  
04:13:29 5 the merits.

6 THE COURT: Okay. Any of the defendants have  
7 anything other to say than what they have on the 402 aspect  
8 of it?

9 MS. FUDIM: No. We stand on our 402.

04:14:08 10 THE COURT: Okay. So -- and the intervenors as  
11 well?

12 MS. RIVAS: (Nodding.)

13 THE COURT: So 30 will be admitted over  
14 objection, but limited purposes for either the APA  
04:14:18 15 exceptions I have noted or for background. I'm sorry,  
16 Article III or remedy.

17 31, what is that?

18 MR. SUAREZ: Same argument, Your Honor, as to  
19 contrary to law.

04:14:37 20 THE COURT: So what is this?

21 MR. SUAREZ: This is the visa application form.  
22 I believe it's training.

23 THE COURT: So is this the document that is  
24 filled out by the applicant?

04:14:48 25 MR. SUAREZ: I believe.

1 MS. FUDIM: This is a visa if you have nothing  
2 to do with this program. Like, if you are seeking a visa  
3 outside of this program, you are a foreign national, you  
4 want to come to the United States, you are seeking a visa,  
04:15:00 5 this is a form that has nothing to do with this program.

6 THE COURT: Right. So that's what I was trying  
7 to figure out. Because this doesn't -- I mean, because  
8 they're not applying for a visa; they're applying to be  
9 paroled.

04:15:10 10 MR. SUAREZ: It goes to the anti-circumvention  
11 argument, that it's contrary to law and that there are --  
12 they're foregoing what should be properly in going through  
13 the visa process and bypassing --

14 THE COURT: So you are saying this is what they  
04:15:24 15 should be doing instead of the parole?

16 MR. SUAREZ: Correct.

17 THE COURT: Okay. All right. I'll overrule  
18 the objections to 31.

19 MS. RIVAS: Your Honor, the intervenor  
04:15:35 20 defendants, if we may be heard.

21 THE COURT: Yes.

22 MS. RIVAS: We object, as we mentioned, in our  
23 motions in limine or motions to exclude, and just want to  
24 reiterate here that we object to this exhibit, Number 31,  
04:15:44 25 all the way through Number 37, on the same grounds, that

1 they're irrelevant.

2                   This is a completely different statute  
3 granting authority for the visa processes and the issue --  
4 the authority at issue here, which is the discretionary  
04:15:58 5 parole authority. The only relevant form in this case is  
6 the I-134A, which is the form that the U.S.-based sponsor  
7 fills out, while the -- and the intended beneficiary is  
8 still abroad. That is the form that initiates this whole  
9 process for the CHNV pathways.

04:16:19 10                   And so Exhibits 31 through 37 are not that  
11 form. They are different forms, not just related to other  
12 immigration processes and benefits by -- under a completely  
13 different statutory authority. And so it is our position,  
14 again, as we mentioned in our written motion, that these  
04:16:36 15 are irrelevant under 402, and we would make that objection  
16 for each one of these seven immigration forms for visas.

17                   THE COURT: All right. Mr. Suarez --

18                   MS. BENTROTT: If I may -- I'm so sorry.

19                   THE COURT: Go ahead.

04:16:49 20                   MS. BENTROTT: If I may, Your Honor, just  
21 to put a final point on it, to the extent plaintiffs want  
22 to point you to other statutory sites and say these are the  
23 parts of the INA that, you know, the parolees should be  
24 doing instead of filing for parole, you know, they can do  
04:17:02 25 that. But there is nothing in these forms that would shed



1 any light on that claim.

2 THE COURT: So that was going to be my  
3 question, Mr. Suarez. If these -- if these are government  
4 documents, and you are going to say this is what they  
04:17:16 5 should have been doing instead of what they were actually  
6 doing, aren't these available for you to cite to? I mean,  
7 can't you cite to this -- to a link to this or whatever  
8 this program is?

9 MR. WALTERS: Yes, Your Honor. They are on  
04:17:29 10 their website.

11 THE COURT: So -- and that is what you're  
12 talking about, right? I mean, it doesn't have to be  
13 admitted. All they have to do is say, "These other  
14 programs exist. You know, they should be going through  
04:17:38 15 this," which is the kind of thing that I get all the time,  
16 which is kind of citations to things that are on government  
17 websites. So --

18 MS. BENTROTT: Right, Your Honor. But, you  
19 know, there is no reason to admit these forms into  
04:17:51 20 evidence. These are not the forms that are relevant as an  
21 evidentiary matter.

22 THE COURT: So that is my question, is what I  
23 thought I was hearing from you is whether or not you were  
24 going to withdraw this and just cite to the link to it or  
04:18:02 25 not.

1 MR. WALTERS: Well, Your Honor, we --

2 THE COURT: Did I misunderstand?

3 MR. WALTERS: I mean, we've designated these  
4 exhibits for basically the ease of, you know, pointing the  
04:18:12 5 Court to this rather than, you know, web URLs. Like, here  
6 is the actual document that we are --

7 THE COURT: It is just the difference between  
8 it being an exhibit and a demonstrative, right? I mean,  
9 so --

04:18:23 10 MS. FUDIM: I don't know that I necessarily  
11 agree with that, because I think -- you know, I don't think  
12 that just because something exists in a public forum it can  
13 be cited to, if it's a substantive document outside the  
14 record. And I say that a little bit because I lost this  
04:18:35 15 argument in front of Judge Wetherell.

16 THE COURT: Uh-huh.

17 MS. FUDIM: And I think he persuaded me that  
18 perhaps he is correct. I mean, for example, in that case  
19 the government pointed to various past programs. And we  
04:18:47 20 said -- you know, we cited to public -- public links of the  
21 existence of past parole programs that existed over the  
22 course of history. And what Judge Wetherell said was: No,  
23 you can't -- you can't cite to those, because the record is  
24 the record, and you never put plaintiffs on notice that you  
04:19:02 25 were going to. And we have a record, and you could have

1 designated them as exhibits, and you didn't do that.

2 Which is part of why in this case we did  
3 put on our exhibit list public citations to past parole  
4 programs and past laws, so that we have that ability.

04:19:17 5 Because Judge Wetherell's point is that just because  
6 something exists in a public forum doesn't mean that you  
7 can just take notice of it after a closed trial. I mean,  
8 the purpose of a trial is to present the evidence and give  
9 each party an opportunity to attack it.

04:19:30 10 And I think he did persuade me that that  
11 may, in fact, be right. So I don't know that I necessarily  
12 agree that just because it is on a government website --  
13 you know, that any information on any public government  
14 website is now fair game to use in post-trial briefs.

04:19:46 15 And I do appreciate counsel saying: Look,  
16 we noted it on our list because we wanted to give the other  
17 side an opportunity to see what we were pointing to.

18 THE COURT: Right.

19 MS. FUDIM: I think that what, perhaps,  
04:19:55 20 intervenors were saying was that if plaintiffs' counsel  
21 want to say, you know, it's not parole that these  
22 individuals should be seeking, it's visa or it is refugee  
23 status, and that there are provisions of the INA which  
24 govern visa applications, or there's provisions of the INA  
04:20:11 25 which govern seeking refugee status, they can cite to the

1 INA itself, which provides what the law is to qualify for  
2 those provisions. I don't know that they need to point to  
3 this is the application you'd fill out. Instead, you would  
4 cite to -- they would cite to -- and obviously I don't want  
04:20:26 5 to do their job for them. But they can cite to provisions  
6 of the INA and say, you know, they're circumventing the  
7 pathway that they should be, you know, proceeding under,  
8 which is visa or which is refugee; and then we can respond  
9 to that.

04:20:41 10 THE COURT: So when you said about Judge  
11 Wetherell not letting in past programs, what about current  
12 links? Active links?

13 MS. FUDIM: Basically, Judge Wetherell's  
14 position was that it can all come in if you had it as an  
04:20:54 15 exhibit and if you put the Court on notice of it.

16 THE COURT: Well, no. I --

17 MS. FUDIM: But you just can't start adding in  
18 post-trial briefing was his point, that you can't just  
19 start pointing to, you know, programs on websites in  
04:21:06 20 post-trial briefing if it is not an exhibit.

21 I mean, I think that that's right. Lots  
22 of stuff is public on the Internet today. And I don't know  
23 that just because something exists on a website link, if it  
24 is not mentioned in the evidentiary portion of a trial,  
04:21:20 25 that it automatically ipso facto becomes part of the

1 record.

2 THE COURT: But if it is a current link to a  
3 visa application on the DHS website, I can't take judicial  
4 notice of it, in any event?

04:21:32 5 MS. FUDIM: Maybe you can if it is a current  
6 link. I mean --

7 THE COURT: Then what is the difference in them  
8 citing to the link? And I could take judicial notice of it  
9 myself and cite it, but why would I even know to do that  
10 unless the parties had brought it to my attention?

11 MS. FUDIM: Yeah. I mean, and here -- I guess  
12 it goes back to the point that I am making, is that I don't  
13 think the application is the relevant piece, which is why  
14 we 402'd it and didn't something-else it.

04:21:49 15 I mean, I think the relevant piece, if  
16 their argument -- you know, if you follow their argument,  
17 the relevant piece is the statute of other provisions of  
18 the INA, which they are saying, like, this program is  
19 contrary to law because it does a workaround around  
04:22:02 20 Congress's intent for such populations to fall under visa  
21 or under refugee, in which case they can make those  
22 arguments and cite to the INA itself. I don't think the  
23 physical application does that work for them.

24 THE COURT: What if the application has  
04:22:16 25 different requirements? For example, you know, you

1 can't -- one of them says if you have been removed before,  
2 and the other one doesn't. Or if one of them says if you  
3 have been present for more than 180 days, but that  
4 requirement is not in the current program. Or just  
5 distinctions --

04:22:32

6 MS. FUDIM: The requirement, I believe, would  
7 be either in the statute or in the implementing  
8 regulations. So I would also say that, you know,  
9 plaintiffs could cite to implementing regulations as well,

04:22:41

10 because those are -- you know, those are more akin to what  
11 would you look to as, you know, citing to a case or citing  
12 to law.

13 The application itself isn't the document  
14 that creates requirements. Requirements are created either  
15 by statute or by implementing regulation. And those would  
16 be the things that would be cited.

04:22:53

17 I did have one thing I wanted to clarify,  
18 but it is not directly on this topic. I just don't want to  
19 forget, so if I may or --

04:23:03

20 THE COURT: Sure.

21 MS. FUDIM: -- I don't know if you want to  
22 close this loop first.

23 THE COURT: Why don't run it down real quick,  
24 because I -- before I forget, what does Texas have to say  
25 about the detailed visa application, as opposed to the

04:23:11

1 statute or the implementing regulations that have the  
2 information that you are looking for?

3 MR. SUAREZ: I agree with counsel that we could  
4 cite the statute. We could cite -- or we could have used a  
04:23:25 5 statute or implementation policy for the exhibit. But the  
6 fact that we used the application doesn't -- doesn't  
7 preclude -- or it doesn't fail to show that there was other  
8 processes available for the CHNV individuals.

9 So while the statute or the implementation  
04:23:45 10 policy would have been sufficient, the immigration  
11 application for this process was also sufficient to show  
12 the same. Whether -- because we chose this instead of a  
13 statute or an implementation policy doesn't preclude the  
14 admittance of this exhibit.

04:24:05 15 MS. BENTROTT: Well, I think -- Your Honor, if  
16 I may. I think that was an admission that all of this is  
17 duplicative and unnecessary.

18 And just to be clear, it is not  
19 necessarily true that these pathways are available to  
04:24:13 20 people who are applying for parole. You know, that's just  
21 a fundamentally -- I think a misunderstanding of the  
22 system. And I think that illustrates why it causes far  
23 more confusion to introduce these into the factual record.

24 And to your point, Your Honor, you know,  
04:24:29 25 perhaps the Court could take judicial notice of these, just

1 as the Court could take judicial notice of the weather in  
2 Texas today, but that doesn't make it relevant.

3 And, again, to the extent Texas would like  
4 to point the Court to other statutory authorities that they  
04:24:44 5 believe that should be followed here, that's what the INA  
6 is for. But these detailed forms that applicants have to  
7 fill out to be a nonimmigrant worker and, you know, provide  
8 all sorts of information doesn't speak to the legal issue  
9 in the case, and it has no evidentiary value here. And

04:25:03 10 really --

11 THE COURT: What does the application get you  
12 that the cite to the statute or regulations doesn't? What  
13 is in here that you are missing?

14 MR. SUAREZ: I don't -- I think the

04:25:14 15 applications are what the agency is reviewing in order to  
16 make these decisions. So this is the information -- so the  
17 argument is they should be evaluating a different -- you  
18 know, some of these people who are applying for this  
19 program, are -- you know, they're being -- they're eligible  
04:25:31 20 to apply for this program because this program was created  
21 because they would -- they would be precluded from applying  
22 under other programs, because maybe there is a numerical  
23 limit or something else.

24 So these applications are what the agency

04:25:45 25 is using to determine whether these people are going to be



1 admitted. And the statute itself does not show what the  
2 agency is doing. These forms were created by the agency,  
3 and they are evaluating the information on these forms.  
4 And the differences between these forms, the information  
5 that they're requiring, shows -- it goes to the issue of  
6 whether they are using this program and evaluating these  
7 applications in a way to circumvent the Congressional  
8 limits in these other immigration programs.

9 THE COURT: So what in these applications

10 identify those limits?

11 MR. WALTERS: I'm sorry, Your Honor?

12 THE COURT: What in these -- so is 31 through  
13 37 basically all kind of the same category?

14 MR. WALTERS: Yes, Your Honor.

15 THE COURT: All right. So what in 31 through  
16 37 provides additional limits that are not findable in the  
17 statute or the regulation?

18 MR. ROGERS: Well, the -- it provides a -- a  
19 concise list of everything that is considered all in one  
20 place, first of all. And then it also shows -- we can use  
21 that to compare with what aliens fill out under the CHNV  
22 program, which is Exhibit 30, to show the difference. And  
23 they're circumventing the very strict requirements that  
24 Congress has set -- Congress has struck a balance -- that

25 the federal government is circumventing by using this

1 separate, other application that it created out of whole  
2 cloth.

3 THE COURT: Do you have this in your  
4 presentation for tomorrow? Are these PowerPoint slides  
04:27:21 5 that are for that?

6 MR. ROGERS: We were just going to show the PDF  
7 on the screen. Yeah, Your Honor.

8 THE COURT: I am not -- I am going to carry and  
9 not admit 31 through 37.

04:27:33 10 In context tomorrow -- well, we have got  
11 to close. Normally, I can -- at these pretrial conferences  
12 I cannot rule on something, and then I can get the context  
13 at the trial; but you are going to rest immediately, and  
14 then your evidence is closed.

04:27:58 15 MS. BENTROTT: I mean, if I may, Your Honor. I  
16 am pretty sure they already said that you could get the  
17 same information from the INA regulations. And if --  
18 that's a simple way to resolve this.

19 THE COURT: Yeah. I am going to sustain the  
04:28:07 20 objections to 31 through 37, unless you have got something  
21 in those particular -- in those particular exhibits that --  
22 or in any of the individual exhibits that are -- that you  
23 don't think that you could get from the statutes or the  
24 regulations.

04:28:22 25 So I am going to sustain them at this

1 point. This evening, spend your time looking forward to  
2 go, "Well, wait a minute, 33 is different because it has  
3 got whatever," if you want me to revisit that. But at this  
4 time, I am going to sustain the objections to 31 through  
5 37.

04:28:36

6 38.

7 MS. FUDIM: May I circle back to the  
8 clarification point, if I may?

9 THE COURT: Yes. I'm sorry. Sure.

04:28:45

10 MS. FUDIM: With respect to 30 in particular,  
11 although I believe the same colloquy may have taken place  
12 with respect to other exhibits, but specifically with 30, I  
13 have heard plaintiffs to say that they were offering it --  
14 that the purpose of offering it was on the contrary to law  
15 prong of their argument. And then I heard the Court say  
16 that it is in with the limitation, that it doesn't go to  
17 the merits. But because contrary to law is a merits piece,  
18 I'm just -- want to make sure I am understanding.

04:28:59

19 THE COURT: What number was that again?

04:29:13

20 MS. FUDIM: 30, Your Honor.

21 So I had heard plaintiffs say --

22 THE COURT: Right.

23 MS. FUDIM: -- that the purpose -- you asked  
24 them, what is the purpose of this? And they had responded

04:29:21

25 in sum and substance that it was coming in to show contrary

1 to law.

2 And then the Court has said it was coming  
3 in with the limitation that it couldn't be used for the  
4 merits. But contrary to law is a merits piece. So I guess  
04:29:36 5 I was a little confused.

6 THE COURT: No. Then I misspoke. So 30,  
7 that's the CBP app?

8 MS. FUDIM: Yes, Your Honor.

9 THE COURT: Yeah. So 30 is designed -- 30 I  
04:29:45 10 was going to let in for the -- for any of the exceptions  
11 that they are able to direct the Court to that deal with  
12 contrary to law, the mandatory versus discretionary.

13 So I did not mean to cabin that out just  
14 to background. So I appreciate you bringing that, because  
04:30:05 15 that is what I wrote down. I am not sure why I said  
16 something was different.

17 So now we have made it from 31 through 37.

18 Where are we on 38?

19 MS. FUDIM: We don't object to the remainder.

04:30:20 20 THE COURT: The intervenors?

21 MS. RIVAS: We don't have any more objections.

22 THE COURT: Any more objections? All right.

23 So 38 -- so discovery responses are coming  
24 in unobjected to? Man, this is a different world.

04:30:32 25 All right. So 38 is in without objection.

1                               39. I have got -- so I don't show any  
2 objections to any of the additional exhibits, subject to  
3 you being the -- actual able to lay your eyeballs on 41,  
4 correct? Is that right?

04:30:54

5                               MS. FUDIM: That's correct.

6                               THE COURT: All right. So 38 through 40 are  
7 admitted.

8                               41, I guess you will confer and then alert  
9 me in the morning, and I can rule on that.

04:31:02

10                              Does that sound right? Okay.

11                              MS. FUDIM: Yes.

12                              THE COURT: All right. Do we need to do  
13 anything to make sure everybody is on the same page, or  
14 does everybody feel like we know where we are on the  
15 plaintiffs' exhibits?

04:31:20

16                              Texas? Mr. Walters? Are you in good  
17 shape?

18                              MR. WALTERS: Yes, Your Honor.

19                              THE COURT: Okay.

04:31:35

20                              MS. FUDIM: Yes, Your Honor.

21                              MS. BENTROTT: Your Honor, actually, I  
22 apologize.

23                              THE COURT: That's all right.

24                              MS. BENTROTT: Before we move on, I did just

04:31:41

25 want to note for the record that during the discussion

1 earlier about the relevance of some of the plaintiffs' base  
2 declarations, Mr. Walters was able to give a relatively  
3 fulsome argument related to standing, and particularly the  
4 facial -- or the veracity of their standing in the face of  
04:32:00 5 a facial attack to standing or challenge to standing. And  
6 we just wanted to note that we did request to give argument  
7 today as to that Rule 12 motion, which we have raised as a  
8 factual challenge to plaintiffs' standing. And we were not  
9 able to give that argument today. So we just wanted to  
04:32:15 10 note that to --

11 THE COURT: If you want to give that argument,  
12 knock yourself out. What I am telling you is, is that I am  
13 going to give an absolutely vigorous and thorough review to  
14 standing. And if there is no standing, then we are not  
04:32:29 15 going to proceed to anything else. You know, if -- unless  
16 there is an ultra vires claim, and I have to understand  
17 that.

18 But you are going to be able to be heard  
19 tomorrow at length, as long as you want to talk, about  
04:32:40 20 standing. I don't know what your concern is about being  
21 able to be heard today, as opposed tomorrow.

22 MS. LANGARICA: Your Honor, I think our  
23 position was that Fifth Circuit case law rightfully treats  
24 standing as a threshold issue. And Rule 12(i) properly  
04:32:55 25 considers the default position from the Courts as -- as to

1 standing as something that should be addressed on --

2 THE COURT: Are you suggesting that I am not  
3 permitted to go to trial unless I have already found  
4 standing?

04:33:08 5 MS. LANGARICA: I am suggesting that both  
6 case -- the case law favors treating standing as a  
7 threshold issue. And judicial economy, also as we raised  
8 in our motion, would favor addressing that before the  
9 parties continue on with trial.

04:33:22 10 THE COURT: Right. But my question is, are you  
11 suggesting that I am not permitted to proceed to trial  
12 unless I have found standing before trial?

13 MS. LANGARICA: I am not suggesting that, Your  
14 Honor.

04:33:30 15 THE COURT: Well, that kind of -- then what is  
16 the point of this argument that you are wanting to make?

17 MS. LANGARICA: I think we just wanted to  
18 repeat the point that we had asked at the start of the  
19 conference today to be heard on the Rule 12 motion.

04:33:42 20 THE COURT: Right. And I am going to hear you  
21 on all of those tomorrow. The whole point of me not  
22 wanting to decide standing ahead of time is that I don't  
23 have the benefit of this argument that we are going to  
24 have. I am not really sure that I understand why I would  
04:33:56 25 have a separate standing argument today before we have a

1 separate merits. Seems to me for efficiency it makes sense  
2 to address both together.

3 But I can assure you, you will be heard,  
4 and there will be a lot of consideration given to standing,  
04:34:11 5 in light of *Texas v. U.S.* And so you will be heard. I  
6 don't know -- I'm trying to figure out if there is any  
7 prejudice that you are suggesting that you are going to  
8 suffer by not being heard on that today, as opposed to  
9 tomorrow.

04:34:27 10 MS. LANGARICA: We understand the Court's  
11 position --

12 THE COURT: No. I am asking -- I am asking you  
13 a direct question.

14 Is there any prejudice that you are going  
04:34:33 15 to suffer from having this discussion tomorrow, as opposed  
16 to today?

17 MS. BENTROTT: If I could clarify something,  
18 Your Honor --

19 THE COURT: Sure.

04:34:39 20 MS. BENTROTT: -- because I think maybe there  
21 has been confusion.

22 THE COURT: Okay.

23 MS. BENTROTT: You said we have got to do  
24 standing first before we do anything else. I thought I  
04:34:45 25 heard you say that.



1 THE COURT: Well, that is the first thing in an  
2 APA claim. So it's --

3 MS. BENTROTT: Right. But I didn't know if  
4 that meant that tomorrow you plan on hearing argument on  
04:34:52 5 the Rule 12 motion before intervenor defendants provide an  
6 opening; and then everyone closes on their evidence; and  
7 then there is closing statements.

8 THE COURT: Right. So the way that I  
9 envisioned this was, just like the Rule 65 motion for  
04:35:04 10 preliminary injunction, which necessarily has a standing  
11 component to it, everything has been consolidated into the  
12 trial. If ultimately I find that Texas and the other  
13 plaintiff states don't have standing, then it stops, at  
14 least with respect to the APA claim.

04:35:19 15 But I don't know that it makes sense to  
16 bifurcate the argument. It seems to me just for efficiency  
17 sake that we handle them all -- not ask people to cut the  
18 standing parts out of their -- out of their arguments and  
19 the PowerPoints, that we just handle them globally. So...

04:35:35 20 MS. BENTROTT: Okay. And so you envision us  
21 addressing standing along with merits and everything else  
22 in our closing?

23 THE COURT: Yes. Just like we would have for  
24 the motion for preliminary injunction. Like I said, motion  
04:35:45 25 for preliminary injunction, the DOJ, intervenors would

1 always say, first, there is no standing; second, there is  
2 not an APA violation; third, the remedy is not appropriate.

3 And so that is absol- -- that is what we  
4 do in a preliminary injunction. That has been consolidated  
04:36:02 5 with this. So I think it makes sense to follow that  
6 process tomorrow.

7 So just to be clear, are you suggesting  
8 that there is any prejudice by following that process?

9 MS. BENTROTT: No. No, Your Honor. And thank  
04:36:12 10 you so much for clarifying.

11 THE COURT: All right.

12 MR. WALTERS: Your Honor, I did have one  
13 related question.

14 THE COURT: Sure.

04:36:17 15 MR. WALTERS: The Exhibits 30 through 37, the  
16 forms for the other programs, would we still be permitted  
17 to have those as demonstratives? We understand they are  
18 not going to be admitted in as part of the trial record,  
19 but could we use those as demonstratives?

04:36:32 20 THE COURT: I don't mind you using it as  
21 demonstratives, but if they are not exhibits, they just  
22 can't be in the findings of fact. So, I mean, if you want  
23 to use that just like any jury aid, I am the jury in that,  
24 so that is fine. So if you're asking if you need to delete  
04:36:43 25 slides out of your PowerPoint, I am not suggesting that.

1                   So -- so the general rule is -- for a jury  
2 trial is, unless it's been admitted into evidence, you  
3 don't show it in a PowerPoint during opening, but you can  
4 use demonstratives in your closing. So you can use it as a  
5 demonstrative.

04:36:59

6                   So -- anything else before we move on to  
7 the other exhibits? I think that that was the lion's share  
8 of where we're -- our issues were.

9                   So are there -- let me get the DOJ's  
10 exhibits here. And, of course, I left those in my office,  
11 so I don't have the list.

04:37:17

12                   My understanding is, is that there are no  
13 objections from the plaintiff states to any of the -- I  
14 don't have a ---I don't have a list. Thank you. Sitting  
15 in there on my desk. All right. So --

04:37:38

16                   MS. FUDIM: I believe that is correct, Your  
17 Honor. And this is Exhibit II, which was supplemented.  
18 And we said -- it is noted in the list, but it was a  
19 placeholder, because it didn't exist at the time that we --  
20 it's the supplemental declaration. So we have a copy for  
21 the Court.

04:37:50

22                   THE COURT: Okay. All right. Reed, if you can  
23 grab that.

24                   So is the United States offering exhibits  
25 A through double I at this time?

04:38:03

1 MS. FUDIM: Yes, with the exception of Exhibit  
2 F, which we withdrew. But you don't have Exhibit F because  
3 it was a supplemental one, in any event. And I believe,  
4 based on the representation of Mr. Walters, that it's some  
04:38:18 5 subset of that is what he is now going to proffer as  
6 Exhibit 41.

7 THE COURT: Okay. So the United States is  
8 offering Exhibits A through E and then G through double I  
9 at this time?

04:38:28 10 MS. FUDIM: That is correct, Your Honor.

11 THE COURT: Any objection from the state -- the  
12 plaintiffs?

13 MR. WALTERS: No, Your Honor.

14 THE COURT: Any objection from the intervenor  
04:38:34 15 defendants?

16 MS. RIVAS: No.

17 MS. BENTROTT: No.

18 THE COURT: All right. So Exhibits A through E  
19 and Exhibits G through double I from the United States are  
04:38:43 20 all admitted without objection.

21 And then we have the intervenor  
22 defendants.

23 Okay. I show Exhibits 1 through -- well,  
24 let me just ask, what exhibits are the intervenor  
04:39:17 25 defendants offering?

1 MS. WILFONG: Yes, Your Honor. We are offering  
2 Exhibits 1 through 141. And these were -- provided a copy,  
3 I believe a paper copy, as well as a USB copy, to the  
4 Court. I have also provided courtesy copies earlier today  
04:39:31 5 to federal defendants, as well as Texas.

6 THE COURT: Okay. All right. Does the  
7 plaintiff states have objections?

8 MR. SUAREZ: Your Honor, we have objections to  
9 just a few of the exhibits that were included as exhibits  
04:39:46 10 to the preliminary injunction. I am not sure where that --

11 THE COURT: I'm sorry. I didn't understand  
12 you. Some that were not included in those exhibits?

13 MR. SUAREZ: Sorry. Some that were included.

14 THE COURT: "Were." All right.

04:39:58 15 MR. SUAREZ: And I don't know exactly where  
16 that is on their new created exhibits, but I have the ECF  
17 number on the exhibits that we do have objections to.

18 MS. WILFONG: I will just note as well, in the  
19 index in the front of the courtesy copies that we provided,  
04:40:16 20 in -- it does include the both the ECF and the tab number,  
21 which is -- which would be the exhibit number side by side  
22 for convenience of reference.

23 THE COURT: I'm not sure that I see those. I  
24 see exhibit -- for example, Exhibit No. 1, supplemental  
04:40:41 25 expert declaration. And then it's got offer -- you said

1 there is a concurrent or --

2 MS. WILFONG: That is correct, Your Honor.

3 Beginning with Tab 66 --

4 THE COURT: Tab 66.

04:40:51 5 MS. WILFONG: -- you will see that there are  
6 also -- there is a column for ECF number. And that  
7 should -- that provides the side-by-side of the tab. And  
8 then --

9 THE COURT: Oh, okay. You're talking about the  
04:41:01 10 first page. You are not talking -- okay.

11 MS. WILFONG: Yes, Your Honor. Tabs 1 through  
12 65 were the additional exhibits provided, and Tab 66  
13 through 141 were the original exhibits incorporated and  
14 which came from the preliminary injunction briefing.

04:41:21 15 THE COURT: Does the United States have any  
16 objections to any of the intervenor defendants' exhibits?

17 MS. FUDIM: No. We take no position.

18 THE COURT: Okay. So since the ECF numbers  
19 start at 175, are any of 1 through 65 not attached to the  
04:41:43 20 preliminary injunction hearing? Because I think that -- I  
21 mean, briefing, because I think that that's what he was  
22 asking?

23 MS. WILFONG: So Exhibits 1 through 65 were --  
24 were not part of the preliminary injunction briefing.

04:41:54 25 THE COURT: Okay.

1 MS. WILFONG: They were provided during the  
2 exchange of exhibits and exhibit lists to all parties.

3 THE COURT: So -- and then from 66 on, since  
4 they have the ECF number, those are the ones that you had  
04:42:04 5 attached -- all right. Yeah.

6 Mr. Suarez?

7 MR. SUAREZ: So it looks like we're -- the --  
8 Tab 103, we have an objection to -- which is -- it's  
9 listed.

04:42:15 10 THE COURT: Before we move on, does that mean  
11 you don't have objections to 1 through 102?

12 MR. SUAREZ: Correct.

13 THE COURT: All right. So Exhibits 1 through  
14 102 from the intervenor defendants are admitted without  
04:42:27 15 objection?

16 Okay. So now we're at 103. I need to  
17 grab the other binder.

18 Okay. I am there.

19 MR. SUAREZ: So this is an e-mail chain between  
04:42:59 20 Mr. Walters and the defendant -- defense counsel. As  
21 your -- as this Court previously held -- or ruled that you  
22 denied the discovery requests from intervenor defendants  
23 after they joined, they asked, and as a courtesy,  
24 Mr. Walters provided some clarification as to the discovery  
04:43:19 25 requests that he provided -- that the State of Texas

1 provided to the DOJ defendants. And as far as any of this,  
2 this would all be hearsay, as well as just not relevant.  
3 These -- this information was already precluded.

04:43:40

4 THE COURT: All right. So what are we offering  
5 103 for?

04:43:58

6 MS. WILFONG: Your Honor, it is -- these are  
7 e-mails that are clarifying the productions of -- discovery  
8 production. And I believe specifically it was cited in the  
9 preliminary injunction briefing for Texas's admission that  
10 it doesn't even attempt to collect data relating to people  
11 paroled under the CHNV Pathways. And I will just note as  
12 well this is an opposing-party statement, so it is not  
13 hearsay.

04:44:12

14 THE COURT: Well, communications between  
15 counsel isn't a party. So this looks to me to be basically  
16 communications between counsel of record over the scope of  
17 discovery?

04:44:24

18 MS. WILFONG: No, Your Honor. It's clarifying  
19 the productions that had been made. And so it's correct  
20 that the Court did deny the motion to compel additional  
21 productions. However, this was submitted for the -- as  
22 evidence for the assertion that Texas admits that it does  
23 not collect data on -- does not even attempt to track data  
24 on this population. And that was on page 10 of our brief.

04:44:55

25 THE COURT: So I am uncomfortable admitting an



1 e-mail communication between lawyers as evidence in a  
2 record. It looks to me that -- I know -- I guess I will  
3 give the plaintiffs a chance to respond.

04:45:12 4 MR. SUAREZ: Yes. I mean, on top of the  
5 hearsay objection, Your Honor, and as intervenor defendants  
6 noted correctly, is that they requested discovery and this  
7 Court already ordered that they were not entitled to  
8 discovery.

04:45:25 9 THE COURT: Didn't I already say that you  
10 wouldn't have been entitled to it, so if they didn't gather  
11 it, that's -- you wouldn't have been entitled to get it  
12 even if they had it, right?

13 MS. WILFONG: Well, Your Honor, as we're  
14 entitled to receive all of the discovery that was produced,  
04:45:37 15 there was just verifications around what was produced.  
16 This is in addition regarding --

17 THE COURT: So what -- what would you be using  
18 this for?

19 MS. WILFONG: Well, as I mentioned, Your Honor,  
04:45:47 20 it was cited specifically for that admission of Texas does  
21 not track this data. I would just note as well this is the  
22 first time that we are hearing this objection from the  
23 State of Texas.

24 Of course, there were deadlines that the  
04:46:01 25 Court had set for providing any objections, and Texas

1 certainly had the benefit of receiving all of the  
2 objections from federal defendants and from the intervenor  
3 defendants well in advance and had the opportunity to  
4 respond to those objections as well as to the motions in  
5 limine.

04:46:14

6                   We -- this is the first time that we have  
7 heard this objection or any concerns from -- from Texas as  
8 to our exhibits, and so to the extent -- first, we would  
9 argue that they waived any such objections, but in the  
10 alternative, we would request the opportunity to receive  
11 any such objections, and the opportunity to respond as  
12 Texas has.

04:46:29

13                   THE COURT: All right. I am going to sustain  
14 the objection to that. I don't believe that e-mail  
15 communications about discovery are evidence in the merits  
16 of the case. So 103 is -- that one is sustained.

04:46:41

17                   What is your next objection, which  
18 exhibit?

19                   MR. SUAREZ: The next objection will come on  
20 Tab 135. So, we would have an objection from 104  
21 through 134.

04:46:55

22                   THE COURT: Say again.

23                   MR. SUAREZ: So 104 through 134.

24                   THE COURT: 104 through 134. And what are the  
25 objections to these?

04:47:09

1 MR. SUAREZ: I said we do not have an  
2 objection.

3 THE COURT: Oh, okay. So Exhibits 104 through  
4 134 are admitted without objection.

04:47:18 5 Next objection is to 135?

6 MR. SUAREZ: Correct. And if it's easier  
7 for -- for argument's sake, 135 through 138, as well  
8 as 140, these are all declarations addressing whether there  
9 is an offset of costs, whether there is net-positive  
04:47:47 10 benefit provided from individuals from the CHNV program,  
11 when they enter the -- when they enter Texas.

12 So as was previously argued already  
13 relating to the offset, and standing, the Fifth Circuit has  
14 already said they are not engaged in an accounting  
04:48:10 15 exercise. So, these -- these aren't relevant at all.

16 THE COURT: So your argument is, is that  
17 because these go to establish that it doesn't establish the  
18 net cost as opposed to gross costs, they should not be  
19 admissible?

04:48:22 20 MR. SUAREZ: Correct.

21 THE COURT: I'll overrule that objection.

22 So that is -- so I will say, I don't know  
23 what the rule is on net costs versus gross costs. I  
24 haven't researched that at all. Even if the Fifth Circuit  
04:48:38 25 has said that it wasn't an applicable and appropriate case

1 doesn't mean that somebody doesn't have a chance to make a  
2 record and change the law.

3 That does not, to me, go to the  
4 admissibility. They could make their argument about the  
04:48:52 5 net costs and gross costs. I don't know how I hear about  
6 it unless they have the opportunity to present evidence on  
7 it.

8 So, those -- that was 135 through 138,  
9 and 140?

04:49:03 10 MR. SUAREZ: Correct.

11 THE COURT: So you have the same objection to  
12 all of those?

13 MR. SUAREZ: Yes.

14 THE COURT: So those are overruled. What about  
04:49:11 15 139?

16 MR. SUAREZ: No objection for the rest, Your  
17 Honor.

18 THE COURT: All right. So that means 135  
19 through 141 are -- all right.

04:49:18 20 So 135 through 138 and 140 are admitted  
21 over objection, which is overruled.

22 139 and 141 are admitted without  
23 objection. Does that sound right?

24 MR. SUAREZ: Yes, Your Honor.

04:49:31 25 THE COURT: Okay. What else?

1 MS. BENTROTT: We have a few housekeeping  
2 issues.

3 THE COURT: Okay. Go ahead.

04:49:41

4 MS. BENTROTT: I have been keeping track so I  
5 can be efficient here.

6 THE COURT: All right.

7 MS. BENTROTT: First, I appreciated Your honor  
8 when you said that sometimes intervenors can be very  
9 helpful in understanding the processes.

04:49:47

10 THE COURT: Right.

11 MS. BENTROTT: I just wanted to note, it seemed  
12 like maybe there was a confusion about the application  
13 process.

14 THE COURT: Right.

04:49:52

15 MS. BENTROTT: And just so the record is clear,  
16 the rule -- the potential parolee is not the person who  
17 fills out the initial application.

18 THE COURT: Okay.

04:50:02

19 MS. BENTROTT: That is filled out by a  
20 supporter here in the United States.

21 THE COURT: Okay.

22 MS. BENTROTT: I just wanted to make sure that  
23 was clear.

04:50:08

24 We also wanted to move the Court to take  
25 judicial notice of related -- *Federal Register* notices

1 related to these pathways.

2 THE COURT: Do you have the -- do you want to  
3 do that at the time? Or that -- so that you can identify  
4 the numbers? Are they going to be referenced, for example,  
04:50:25 5 in your presentation?

6 MS. BENTROTT: Yes.

7 THE COURT: Do we anticipate there being a  
8 problem with taking judicial notice of the *Federal*  
9 *Register*?

04:50:31 10 MR. WALTERS: No, Your Honor. If these are the  
11 *Federal Register* notices related to this program --

12 MS. BENTROTT: Exactly.

13 MR. WALTERS: -- yeah, we have no objection to  
14 that.

04:50:37 15 THE COURT: All right. Then I don't see a  
16 problem. And I don't anticipate there being -- and even  
17 so, you will be able to present them, even if they're not  
18 admitted into evidence, and I will be able to hear them.

19 MS. BENTROTT: Okay. Thank you.

04:50:46 20 And just for the record, under  
21 44 USC 1507, the contents of the *Federal Register* shall be  
22 judicially noticed.

23 THE COURT: Yeah. I can't imagine a situation  
24 where they wouldn't be. So...

04:50:57 25 MS. BENTROTT: And last, we just wanted to

1 ask -- you know, today took, I think, longer than maybe  
2 some of us expected. And so for planning purposes, we just  
3 wanted to sort out --

4 THE COURT: If you think that is true for  
04:51:09 5 today, wait until tomorrow.

6 MS. BENTROTT: I think you saw exactly where I  
7 was going, Your Honor. I was wondering if it -- just for  
8 clarity we could talk about how long we expect tomorrow to  
9 go. You know, I don't know how long Texas expects it will  
04:51:20 10 take to cross-examine our witness and how long the parties  
11 want to go for closing.

12 THE COURT: So I don't expect the witness to be  
13 very long. I think that with the first *Texas v. U.S.* case,  
14 when I offered up letting everybody talk as long as they  
04:51:36 15 wanted to, which I'm offering up again, everybody assured  
16 me, oh, it's an hour. Oh, it's two hours. And it was not.

17 So whatever -- however long you think you  
18 are going to take, multiply it times two.

19 And like I said -- so are you asking for a  
04:51:49 20 hard deadline?

21 MS. BENTROTT: No. Just to get a sense for  
22 planning purposes if the parties know --

23 THE COURT: You are going to have to talk to  
24 them --

04:51:56 25 MS. BENTROTT: Okay.

1 THE COURT: -- because I am not going to put a  
2 limit on how much anybody wants to be heard.

3 MS. BENTROTT: Okay.

4 THE COURT: And at the end of all of that, you  
04:52:02 5 need to understand I will probably have some questions  
6 myself.

7 And so the *Texas v. U.S.* case, we had one  
8 day of evidence, several witnesses, and some things like  
9 that. We finished up -- we started the next day at 9  
04:52:20 10 o'clock for argument, and we finished at 6:00. So it was a  
11 lot of argument.

12 MS. BENTROTT: That's helpful to know, Your  
13 Honor.

14 And just for housekeeping purposes, I  
04:52:29 15 assume we will handle the stickers in the record after we  
16 go off record? I mean, admitting the exhibits that the  
17 Court admitted.

18 THE COURT: So they have been admitted.

19 Kellie, do you have -- yeah, just get with  
04:52:39 20 Kellie on the originals.

21 MS. BENTROTT: Great.

22 THE COURT: Do you have them, Kellie?

23 THE CASE MANAGER: No. They have them.

24 THE COURT: All right. So if you give those --  
04:52:45 25 and just make sure she takes custody of whatever the



1 originals are to make sure -- I don't have 41 for the  
2 plaintiffs. And those haven't been admitted yet because  
3 y'all were going to --

4 MR. WALTERS: Your Honor, I don't know if we  
04:52:56 5 wanted do that now. I have copies for everyone to look at.

6 THE COURT: Knock yourself out.

7 MR. WALTERS: And these are documents that  
8 everyone has seen before, and --

9 MS. FUDIM: Thank you.

04:53:07 10 MS. BENTROTT: And just -- Your Honor, what  
11 time do you want to start tomorrow? And do you expect us  
12 to close at a certain time?

13 THE COURT: So what time do y'all want to  
14 start? I can start at 8 o'clock. I can start at 9  
04:53:19 15 o'clock. I can start later. What do you want?

16 MS. BENTROTT: I think 8:00 would be early for  
17 my colleagues from the West Coast. I'm from the East  
18 Coast. That would be fine for me. But I think  
19 my colleagues would not be pleased if I said 8:00.

04:53:34 20 THE COURT: The DOJ never sleeps, right?

21 So do you have a preferred time?

22 MS. FUDIM: 9:00, 9:30, something like that.

23 THE COURT: All right. Does that mean you're  
24 hoping for 9:30?

04:53:45 25 MR. WALTERS: 9:30 sounds good to me.

1 MS. FUDIM: We're comfortable with either.

2 THE COURT: So does 9:30 work for everybody?

3 MS. BENTROTT: That is great.

4 THE COURT: Okay. So we will start at 9:30.

04:53:55 5 We go as late -- I will work all night. I don't want my  
6 staff to have to do that.

7 And so, you know, I am -- unless we are  
8 getting really close, I would probably -- if it gets to be  
9 about 5:30 or 6:00, we will probably close up shop. If  
04:54:07 10 everybody else tells me we are almost done -- and it is  
11 amazing how almost done people get if it means they don't  
12 have to come back the next day, but I don't want anybody to  
13 feel constrained on time.

14 MS. BENTROTT: Thank you so much, Your Honor.  
04:54:18 15 I appreciate it.

16 THE COURT: That's all right.

17 MS. FUDIM: And we have no objection to the  
18 material that was just proffered to us for Plaintiffs'  
19 Exhibit 41.

04:54:25 20 THE COURT: Okay. Do intervenor defendants  
21 want to take a look at that real quick? Do you have it?  
22 And if you want the night, I mean, you can take a look at  
23 it.

24 MS. BENTROTT: I think we will look at it  
04:54:34 25 tonight, Your Honor.

1 THE COURT: Okay. All right. All right. If  
2 there is nothing else, everyone is excused. You don't have  
3 to wait on me because I have got to clean up what I have  
4 done up here. So we will see you tomorrow, and we will  
5 kick off at 9:30.

04:54:46

6 MS. BENTROTT: Thank you, Your Honor.  
7 (Concluded at 4:54 p.m.)

8 COURT REPORTER'S CERTIFICATE

9  
10 I, Kathleen K. Miller, certify that the foregoing is a  
11 correct transcript from the record of proceedings in the  
12 above-entitled matter.

13

14 DATE: September 1, 2023 /s/ Kathleen K. Miller

15 Kathleen K. Miller, RPR, RMR, CRR

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